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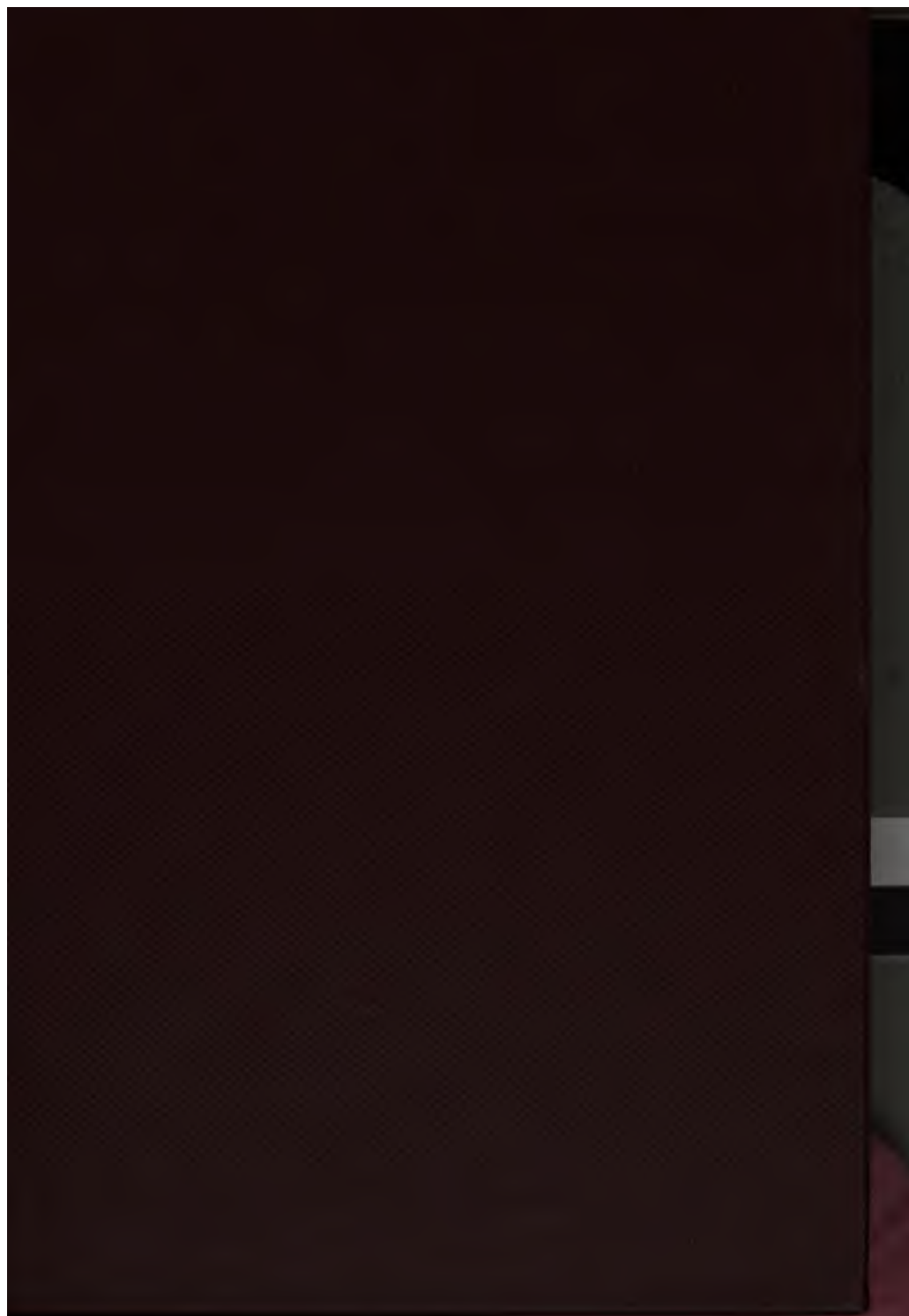
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# **The Commercial Power of Congress,**

**Considered in the Light of its Origin**

**The Origin, Development, and Contemporary Interpretation of  
the Commerce Clause of the Federal Constitution, from  
the New Jersey Representations, of 1778, to the  
Embargo Laws of Jefferson's Second  
Administration, in 1809.**

**By**

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Of the New York Bar**

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## INTRODUCTION

THE extent of the power of Congress, under the Constitution, to regulate interstate commerce has been more thoroughly investigated during the last six years than ever before, unless possibly during President Jefferson's second administration. The ardent opposition to the Railroad Rate bill, the Employers' Liability bill, and other measures proposed during President Roosevelt's administration, for the purpose of controlling the great railroad and other corporations through the power of Congress to regulate commerce, led to thorough inquiry into the basis of the power; but, as is usual when radically different positions are taken by opposite parties to a debate, both sides advanced arguments which sober reason would find it difficult to approve. On the one hand, supporters of the administration claimed powers for Congress exceeding what were justified by the origin of the Constitution or the decisions of the Supreme Court; on the other hand opponents of the President rested much of their case upon a statement of facts, so partial as to be substantially incorrect. It therefore seemed worth while to undertake an

independent inquiry into the events which preceded and attended upon the framing of the Constitution and the first operating of the new government under it, in order to ascertain the opinions and purposes of the men who framed the instrument and their contemporary interpretation of the scope of the powers of the government; and this with particular reference to the commerce clause. I therefore entered upon the inquiry, proceeded with it for several years, as my leisure permitted, and present the results in the following essay.

Of course such a study is quite different from an essay in constitutional interpretation. For, if the terms of a constitution are plain, their scope cannot be varied by reference to the state of contemporary opinion in the community in which, or the assembly by which, the instrument was framed. Nevertheless, it may be not without interest, and perhaps not without value, to reproduce, as graphically as we can, the events and the spirit of the times in which the Constitution was made, so that we may see again with the eyes and think the thoughts of its framers concerning their handiwork.

In one important respect the view-point of this essay differs from that of other recent publications upon the same general subject. For they have assumed that the terms of the Constitution are accounted for by the earlier efforts to enlarge the

commercial powers of the old Congress; and this opinion has sometimes been so expressed as to imply that the Government of the United States is a device for regulating trade, and that the scope of the powers of that government is to be determined by ascertaining what were the nature and extent of the commercial regulations desired by certain leaders of opinion in the years shortly preceding the assembling of the Convention at Philadelphia, in May, 1787. But, in the view here presented, those efforts became, through the Annapolis assembly of 1786, only the occasion for calling the Constitutional Convention together; but the terms in which the instrument was expressed and the ends sought to be attained through it, resulted from a much deeper motive than the desire to improve the regulation of commerce—from the conviction of a governmental and social aristocracy, alarmed over the threatened breakdown of government and order in America, that a strong central authority was indispensable to the maintenance of order and civil peace, and to the protection of rights of property against the assaults of the multitude. In its origin, the Constitution of the United States is not a trade convention; it is the framework of a national government with strong coercive powers, formulated by the political, social, and financial leaders of the time, under the influence of great fear, for the purpose of protecting themselves and

their property. This determination of the dominant party in the Convention drew into its design all incidental powers bestowed upon the new government; and a correct view of the scope which the members intended to give to the several powers, including that over commerce, cannot be obtained without recognition of this dominant purpose. Had the trade convention at Annapolis succeeded, in 1786, amendments to the Articles of Confederation in certain particulars would have resulted, as in vesting greater powers over commerce in Congress, but the principle of the government would have remained the same. But from the failure of that assembly, the break-up of the Confederation, and the meeting of the Constitutional Convention at Philadelphia, there issued a new kind of government, framed for national as distinguished from confederated administration.

This is, of course, not a new view of the origin of the Constitution. It was asserted in the discussions over the ratification of that instrument and in the Congressional debates in the early years of the Republic. It is also the view of Curtis and Bancroft; but these authors wrote in the interval between the settlement of the controversy over nullification and that recently arising about the affirmative exercise by Congress of powers long ago virtually attributed to it by the Supreme Court, but formerly unused; and there was no occasion for their dilating upon the conse-

quences of such origin upon the several powers of the government. Recent writers upon the commercial powers of Congress have frequently overlooked this origin, and the weight of their conclusions has diminished accordingly. This essay is, therefore, a return to the older, and, as I think, the more correct opinion.

But though the cause which produced the Constitution was deeper than the desire to improve the regulation of commerce, that desire was powerful in initiating the movement toward the new government, produced the Annapolis Convention, and through it became the immediate occasion for assembling the Constitutional Convention; and therefore this inquiry properly begins with the movements for enlarging the commercial powers of Congress, from about the middle of the Revolutionary War to the meeting of the Constitutional Convention.







# The Commercial Power of Congress

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## CHAPTER I

### EFFORTS TO IMPROVE THE REGULATION OF COM- MERCE—THE FIRST STEPS—THE NEW JERSEY PROPOSALS OF 1778

**A**T the outbreak of the Revolution the hardships of the period of discovery and settlement in the seaboard communities were over. The Colonies were attaining much prosperity, and were already beginning the western advance, which has had important consequences, not only in territorial expansion, but also in enlargement of conceptions of national power. They had a thriving foreign commerce, and an internal and interstate trade, which though small was active, and even then an object of encouragement. The main highways of this interstate trade were the bays, sounds, and rivers, making water communication between the principal towns on or near the sea fairly convenient and regular. But this water

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transportation was not, even then, the only interstate trade. There are abundant evidences also of land traffic from State to State, and the development of interstate coach lines and postal routes; and, indeed, much of the principal interstate trade and travel of this period, as between New York and Philadelphia, and between Boston and New York, was partly by water, partly by land. That interstate traffic by land had grown to considerable importance, before the meeting of the Constitutional Convention, is proved by the provisions in the tariff acts of various States for regulating such traffic by duties upon goods thus brought into the several States, and by other measures. The volume of these various forms of interstate traffic and intercourse was trifling in comparison with the vast interstate commerce of to-day; but the traffic and intercourse were even then considerable in proportion to the small population, and increased in importance as the date of the Constitutional Convention approached, both in themselves, and in their relation to foreign commerce. For during all the formative period of our history, and certainly until after the beginning of the nineteenth century, the connection between the internal and the foreign commerce was much closer than can now be readily understood. The extent of the settled regions of the United States is now so great, and the interstate trade between localities distant from the

coast is so enormous and so specialized, that certain regulations might be applied either to the foreign commerce or to such special interstate trade without materially affecting the other branch of commerce; but, until well after the date mentioned, the connection between the interstate and the foreign commerce was so intimate, that adequate regulation of neither could be effected without complete power of regulating the other. This situation gradually brought the public men of the period to that perception of the necessity of vesting the power of regulating both the foreign and the interstate trade of the country in the central authority, which produced the commerce clause of the Constitution. For before the meeting of the Convention they had generally come into agreement with Madison's remark, that the regulation of commerce was in its nature indivisible, and ought to be wholly under one authority.<sup>1</sup>

A superficial consideration of this situation, ignoring other facts in the history of the Colonies and States, between the outbreak of the Revolution and the Constitutional Convention of 1787, has led some to conclude, that, as a principle of

<sup>1</sup> 5 Elliot's *Debates*, 548, Lippincott's Edition of 1866, in which the supplementary volume is indicated as "vol. v." The reader who is curious about the several editions of Elliot's work will find interesting notes in P. O. Ford's *Bibliography and Reference List to the history and literature relating to the adoption of the Constitution of the United States*, Brooklyn, 1896.

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constitutional interpretation, the powers of Congress over interstate commerce are to be construed as wholly or chiefly ancillary to the control of foreign trade. But a more thorough study of American history during the period in question indicates that, prior to the meeting of the Convention, the regulation of the trade between the States had become of importance in itself; a means of affecting the relation of the growing West to the communities on the Atlantic free-board; and a part of a profound constitutional change, which was broader and deeper than all regulation of trade, foreign, interstate, or both.

The Articles of Confederation were termed by the Congressional Committee of 1778, when recommending their ratification by the several States, that "glorious compact, which, by uniting the wealth, strength, and councils of the whole, may bid defiance to external violence and internal dissensions, whilst it secures the public credit at home and abroad"<sup>1</sup>; and their ratification, in 1781, by Maryland, the last of the States to ratify, seems to have produced a general feeling of joy and hopefulness.<sup>2</sup> But Washington was already convinced of the necessity of vesting Congress with greater powers than they then exercised<sup>3</sup>;

<sup>1</sup> Elliot's *Debates*, vol. i., 68.

<sup>2</sup> Duane to Washington, Jany. 29, 1781.

<sup>3</sup> Washington to Duane, Feby. 19, 1781, in Bancroft, *History of the Constitution*, vol. i., 283, 284.

and in the previous year Hamilton, in his celebrated letter to Duane,<sup>1</sup> had urged the need of increasing the powers of Congress; particularly that Congress should have complete power, which he termed "complete sovereignty," over all that related to war, peace, trade, and finance. //

The experience of the country soon showed that the expectations of the Congressional Committee were not to be gratified; and, even before the Articles of Confederation went into effect, the inadequacy of the power of the general government under them to regulate the foreign commerce of the country had been commented on by the Legislative Council and General Assembly of the State of New Jersey. In the second objection of their representations to the Continental Congress, in 1778, they say:

By the sixth and ninth articles, the regulation of trade seems to be committed to the several States within their separate jurisdiction, in such a degree as may involve many difficulties and embarrassments, and be attended with injustice to some States of the Union. We are of the opinion that the sole and exclusive power of regulating the trade of the United States with foreign nations ought to be clearly vested in the Congress, and that the revenues arising from all duties and customs imposed thereon ought to be appropriated to the building, equipping, and manning a navy, for the

<sup>1</sup> *Works of Alexander Hamilton* (Lodge's edition) vol. i., 203 et seq.

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protection of the trade and defence of the coasts, and to such other public and general purposes as to the Congress shall seem proper, and for the common benefit of the States. This principle appears to us to be just, and it may be added, that a great security will, by this means, be derived to the Union from the establishment of a common and mutual interest.<sup>1</sup>

Two clauses in this objection deserve particular attention. The first is that which affirms that the sole and exclusive power of regulating the trade of the United States with foreign nations ought to be clearly vested in Congress.

For this phrase indicates the desire of the Legislature of New Jersey to invest Congress with a complete and positive power of regulating foreign commerce. The words, "sole and exclusive power," do not lend themselves readily to any other interpretation, and it is clear that much more was intended than the negative power of preventing the inflicting of injuries upon our commerce by foreign nations. The power intended to be vested was to include authority to regulate that commerce positively for the welfare of the Union. In a few years, when the conception of commercial regulation expanded to include trade between the States, the intended control of this branch also came to be expressed

<sup>1</sup> 1 Elliot, 87. The representations are also given in full in Curtis, *History of the Constitution*, vol. i., 493.

in the same words, or in others of identical meaning; and when these later proposals are compared with the New Jersey representations of 1778, it becomes apparent, that the course of events had forced upon the minds of some, at least, of the foremost men of the time the conviction, that the condition of the country required the giving to Congress of that complete and positive control over interstate trade, which New Jersey, in 1778, recommended as to foreign trade.

The second of the clauses deserving attention is that in which it is stated, that the bestowal of the exclusive regulation of foreign commerce upon Congress, and the appropriation of the resulting revenues to national objects, would establish a common and mutual interest between the States, thereby conferring a great security on the Union. This is a recognition, even before the ratification of the Articles of Confederation, of the intimate connection of trade regulation with other national interests, which was deeply fixed in the thought of that day; became one of the grounds relied upon by Judge Davis for affirming the constitutionality of the Embargo Laws of 1808<sup>1</sup>; and has underlain some of the most important decisions of the Supreme Court in recent years, as in the Lottery cases.<sup>2</sup>

<sup>1</sup> U. S. *vs.* Brigantine William, 2 Hall's *Law Journal*, 255 (1808).

<sup>2</sup> 188 U. S., 321 (1903).



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Indeed, the principle that when a power over a particular subject is vested in Congress, that power may be exercised, not only to advance that subject, but also, through such regulation, to promote the general welfare of the country, has supported much of the legislation of the last twenty-five years, and it is interesting to find the germ of this principle in these representations of New Jersey one hundred and thirty-one years ago.

## CHAPTER II

### EFFORTS TO IMPROVE THE REGULATION OF COMMERCE, 1781-1786—THE GENERAL SITUATION—EFFORTS OF INDIVIDUAL STATES

THE forebodings of New Jersey were justified soon after the Confederation went into effect. Between 1781 and 1787, events at home and abroad produced a general opinion that the limitation of the powers of the central government, under the Articles of Confederation, was productive of serious injury to the country; showed the futility of legislation by individual States as a remedy; and engendered a conviction in the minds of those who afterward controlled the Philadelphia Convention, that a considerable change in the distribution of powers between the central government and the States was indispensable. Between 1781 and the outbreak of Shays's Rebellion, in 1786, the history of the country was largely the history of efforts to increase the governmental revenues and to improve the condition of trade. As the revenue measures are but indirectly connected with the subject of this essay, they will be referred to only incidentally. Considering the efforts to

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improve trade conditions broadly, rather than strictly chronologically, they developed, out of Congress, from attempts by individual State legislation to a wide-spread demand, expressed in numerous proposals, that such individual efforts be prohibited, and a general power of regulating both interstate and foreign commerce be vested in Congress. These proposals were peculiar to no locality nor class of men. In widely separated districts and among men of various callings, we find propositions for increasing the powers of Congress over commerce; and this general sentiment, being shared by members of Congress, produced several proposals in that body, which show how great was the extent of the powers over commerce, which leaders of opinion of that day were willing to vest in the central government. Parallel with the experience of the Confederation in connection with the regulation of trade went the exhibition of its defects in other respects, producing suggestions for more fundamental amendment of the Articles, until in 1786-1787, the disorders in Massachusetts and other States created such alarm, lest all civil government would be overthrown, that the various propositions for amending the Articles were swept into the powerful current of centralization, which was the real force to bring the convention together, and to direct its deliberations.

As we approach the date of the convention, the

commercial proposals are seen to develop from a less to a more complete power of regulation; and the demands for enlarged power over commerce and for a stronger central government inevitably reacted. On the one hand, the enlarging conception of the necessary powers over commerce promoted the movement for a stronger central authority; on the other hand, the deepening conviction of the need of stronger central authority to save the commonwealth enlarged the conception of the scope of the commercial powers to be granted to Congress. The effort to obtain the commercial powers therefore became the result of many influences; and the power to regulate commerce, vested in Congress by the Philadelphia Convention, can no more be separated from the irresistible movement of 1787 toward a strong coercive government, than can any other power.

The demand for larger powers in the Confederacy developed throughout the country before the proposals were made in Congress for increasing the powers of that body, the proposals being indeed related to the demand, as the effect to the cause; and I shall therefore consider the movement for enlarged powers throughout the country, before turning to the Congressional proposals.

The prosperity of the country at the beginning of the Revolution was checked by that war, and the country came out of it with much poverty and actual hardship, although later historians

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incline to the opinion that the older writers exaggerated the depressed condition. Hardship and poverty, however, there were, and the sources first looked to for improvement were the foreign commerce and the ship-building industries. But the action of Great Britain, even before the peace of 1783, frustrated expectations from these, and thereby started, or gave increased impetus to, the movement which ended in a new government. One result of independence was the alienage of citizens of the States, and there were in Great Britain interests sufficiently powerful to induce that government to take advantage of this alienage to deprive American shippers and merchants of privileges which they had before enjoyed, in common with other Englishmen. In seeking terms upon which to arrange the peace, it had been the earnest purpose of the American commissioners to obtain the right of unrestricted trade with the West Indies, but the British Orders in Council, of July, 1783 excluded American vessels from that trade. Burdensome restrictions were imposed about the same time upon American vessels trading with Great Britain and upon the importation of American products into that country. American merchants and industries were not long afterward further injured by the reaction from unwise and excessive importations of British goods, which both hurt the importers and produced intense competitions with other

traders. The consequences of these unfavorable conditions, which originated in Great Britain, or at least were charged to her by public opinion in America, were great depression in the ship-building and other industries and business in the United States, and a wide-spread demand for retaliation by the passage of laws excluding British ships and goods from American ports, and for protection to domestic trades and industries by duties upon imports. ✓

But under the Articles of Confederation, Congress had no power of regulating commerce adequate to the passage of such laws.<sup>1</sup> It had no power to levy duties on imports or exports, nor tonnage dues on foreign ships, nor had it any power to exclude foreign ships or goods from American ports; while its power of entering into

<sup>1</sup> By the Articles of Confederation the power of regulating both foreign and interstate commerce was left to the several States, with only such restrictions as arose from the provisions of Article 6, that no State should enter into any treaty, agreement, or alliance with any other State or foreign power without the consent of Congress, or lay any imposts or duties which might interfere with any stipulation entered into by the United States in Congress assembled, with any king, prince, or State, in pursuance of any treaties already proposed to Congress, to the Courts of France and Spain, and from the power bestowed upon Congress by Article 9, of entering into treaties of commerce. The powers of the States were further guarded by Article 2, which recited, that each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right which was not by this Confederation expressly delegated to the United States in Congress assembled.

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✓ treaties and alliances was limited by the proviso that no treaty of commerce should be made, whereby the legislative power of the respective States should be restrained from imposing such imposts and duties on foreigners as their own people were subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatever. It resulted from this situation, that demands for retaliatory and protective legislation by Congress between 1783 and 1788 were often accompanied by suggestions that the Articles of Confederation be amended to confer adequate powers of commercial regulation upon that body. These suggestions were at first directed only to larger power over foreign commerce, but quickly came to include greater power over interstate commerce also, because of the close connection of the regulation of interstate with the results sought to be obtained by the regulation of foreign commerce. But amendment to the Articles of Confederation required the assent of every State to become effective; remedy by amendment was therefore slow at best, and in the division of public opinion respecting particulars, was not accomplished even up to the end of the Confederation. The natural result followed; individual States attempted "countervailing" legislation by imposing various prohibitions, import duties, and other burdens on British ships and goods, and a great number of tariff and

tonnage acts were passed by various States between 1783 and 1788.

In enacting these measures the States were merely continuing, under novel conditions, a policy with which they had become familiar before the Revolution. The legislation aimed at three principal results: raising of revenues, protection to domestic trades and industries, and retaliation upon Great Britain for her Orders in Council; and it is an interesting and important observation, that this legislation, as also the earliest revenue measure of the United States Congress after the adoption of the Constitution, included the principle of protecting domestic trade and industries by duties on imports. That protection was a purpose of the acts, is explicitly stated in some of them, as in those passed by the State of Pennsylvania, September 20, 1785; April 8, 1786; March 15, 1787, and March 29, 1788,<sup>1</sup> and in that passed by Rhode Island in 1785.<sup>2</sup> Indeed, by the men of that generation commonly, as by Hamilton, in his papers published in 1781, under the title, "The Continentalist,"<sup>3</sup> the imposing of protective

<sup>1</sup> Statutes at Large of Pennsylvania, vol. xii., p. 99 (Ch. M. C. L. xxxviii.); p. 232 (Ch. M. C. C. xxvii.); p. 403 (Ch. M. C. C. lxxvi.)

<sup>2</sup> Rhode Island Schedules, 1785, June, 1785, 18.

<sup>3</sup> "The Continentalist," in Hamilton's *Works*, edited by Lodge vol. i., pp. 248, 264. These essays, are considered by Mr. Lodge to mark the beginning of the movement for a new system of government, which resulted in the conventions of Annapolis and Philadelphia, the adoption of the Constitution, and the foundation of the Federalist party.



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duties was understood to be included under, and was perhaps the most important particular of, the power to regulate commerce. Hamilton was an extreme nationalist, and his opinions upon the need of complete supremacy of the central over the State governments cannot, of themselves, be fairly cited as evidence of any considerable body of contemporary opinion in support of such views. But as to the need of bestowing large commercial powers upon Congress, and of investing that body with authority to foster domestic industries by duties and other burdens on imports, all research indicates that the large majority of the public were in agreement with him. In "No. IV of *The Continentalist*," August 30, 1781, he places first among the particulars in which the authority of the Confederation ought to be augmented, "the power of regulating trade, comprehending a right of granting bounties and premiums by way of encouragement, of imposing duties of every kind, as well for revenue as regulation, of appointing officers of the customs, and of laying embargoes in extraordinary emergencies."

In later years there has been much ingenious constitutional argument to support the proposition that the commerce clause of the Federal Constitution does not bestow upon Congress the power to impose duties on imports for protective purposes. But however learned and ingenious

these arguments may be, as specimens of refined constitutional interpretation, the history of the period preceding the adoption of the Constitution, and the views expressed in the first Congress which met after the inauguration of the new government, show that the public men of the constitutional period considered the power to impose protective duties on imports one of the most important elements in the regulation of foreign commerce. To them the regulation of commerce was a practical matter, not a subject of refined legal distinction; and they would have been greatly surprised had they been informed that, by placing various other clauses, as that relating to taxation, in the Constitution, they had taken from Congress that power of protecting local industries, to secure which to the central government was an important factor in bringing about the meeting of the Constitutional Convention.

The practical view which determined the formulation of the Constitution has, perhaps, never been more clearly set forth, than by Josiah Quincy, in his speech in the House of Representatives, in 1808, on the suspension of the Embargo, in which he was in accord with the supporters of President Jefferson.

The Constitution of the United States, as I understand it [he said], has in every part reference to the

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nature of things and the necessities of society. No portion of it was intended to serve as a mere ground for the trial of technical skill or verbal ingenuity. The direct, express powers, with which it invests Congress, are always to be so construed as to enable the people to attain the end for which they were given. This is to be gathered from the nature of those powers, compared with the known exigencies of society and the other provisions of the Constitution. If a question arises, as in this case, concerning the extent of the incidental and implied powers vested in us by the Constitution, the instrument itself contains the criterion by which it is to be decided: We have authority to make "laws necessary and proper for carrying into execution" powers unquestionably vested. Reference must be had to the nature of these powers to know what is "necessary and proper" for their wise execution. When this necessity and propriety appear, the Constitution has enabled us to make the correspondent provision.<sup>1</sup>

The way to the embodying of this power in the central government was prepared by the tariff acts of the several States, which by their conflict one with another prevented the obtaining of that protection for local interests which had been sought in their enactment. Their failure turned the public mind, not against the principle of protection, but toward the vesting in the central government of power to prevent the conflict

<sup>1</sup> *Speeches of Josiah Quincy*, Boston, 1874, p. 34; *Annals*, 10 Cong., 1st Session, 2200.

between the State enactments, and to provide the protection which the States had been unable to provide.

The number of the State tariff acts is so great, and their provisions are so complicated, that it is difficult to determine precisely their relation to trade among the States. An examination of the whole of this legislation, in a large majority of the States, justifies the conclusion, that their provisions were directed at first against Great Britain; but that by 1785-1786, they had been turned in most, if not all, of the States, against the products, ships, or merchants of the sister States. It is at least certain, that by 1785, either because of their imposition of duties on the productions of other than the enacting States, or because of harsh methods of administration, the enactments of several States had excited much bitter feeling; and one cause of the discontent was peculiarly connected with interstate traffic, and by land. Probably most of the commodities then consumed in the country were of foreign production; and that there was an active trade across State boundaries by land is shown by the numerous provisions in the State tariff acts imposing duties and other burdens expressly upon goods thus brought into the enacting States. It was inevitable that such burdens, even if the tariff acts imposed them only upon goods of foreign origin, should be vexatious to merchants of various

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States. For the foreign goods must have then been the greater part of the merchants' stocks; and the situation of certain of the States, and particularly of New York, was such that the various burdens upon goods, even of foreign origin, provoked resentment among consumers as well as traders in other States. A forceful reference to this situation is made by Dr. Hugh Williamson, in his letter to James Iredell, of June 11, 1788, in which, complaining of the selfish tariff policy of New York, he writes that "half the goods consumed in Connecticut, or rather three fourths of them; the goods consumed in New Jersey, or three fourths of them; all the goods consumed in Vermont, and no small part of those consumed in the western parts of Massachusetts, are bought in New York and pay an impost of 5 per cent. for the use of that State."<sup>1</sup>

The States also commonly imposed tonnage dues upon American as well as foreign vessels entering their ports, although the dues upon American vessels were generally fixed at lower rates than on the foreign vessels. Various burdensome conditions as to the entry of vessels at the customs-houses within the several States were, however, applicable as well to ships from other States as to those from foreign nations, and it was a bitter grievance of States which imposed restrictions on British ships or goods, that neighbor States

<sup>1</sup> *Life of James Iredell*, by Griffith McRee, vol. ii., p. 227.

opened their ports to attract those goods and ships.

The private correspondence and public documents of the day very clearly exhibit the development of public opinion from bitterness at the trade situation up to the conception of a new kind of government, which prepared the way for the Philadelphia Convention. First, irritation at the selfishness and arrogance of particular States, as New York and Massachusetts, is expressed, and the desire to prevent the conflict between the laws of the several States arises; to this succeeds the wish to bestow upon the central government power adequate to prevent the conflicts between the States, and to completely regulate commerce both foreign and interstate; and this desire, co-operating with the fear that the Confederation is about to collapse, generates a rising demand for a convention of all the States to revise the system of government. A few extracts from the writings of that day, in addition to those before given, will suffice to graphically set forth the situation of the country and the development of opinion.

In a letter to Madison, of December 14, 1784, Monroe notes that Connecticut "hath also laid a duty of 5% upon all goods imported from a neighboring State. This effects Rhode Island very sensibly."<sup>1</sup> On June 10, 1785, Governor Bowdoin informed the Massachusetts Legislature,

<sup>1</sup> *Writings of James Monroe* (Hamilton), vol. i., 52.

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that he was advised by the naval officer of the port of Boston that several States had laid duties on goods imported which injured the trade of the Commonwealth,<sup>1</sup> and on June 27, 1785, the Legislature of Massachusetts authorized and requested the Governor<sup>2</sup> "to expostulate with such of the United States as had passed impost and excise acts, or other laws for the regulation of trade, that affect the commercial interests of citizens of this State," and to urge upon the offending States the propriety of making such alterations and amendments (in their laws) "as shall render them not only conformable to the spirit of the confederation, but consistent with those principles of reciprocity which, in a national view, ought ever to be adopted."

New York was a principal offender in this interstate tariff war, as indicated by Dr. Williamson's letter above quoted, and the citizens of Connecticut and New Jersey were particularly affected adversely. In the latter State feeling arose to such height that the legislature declined to accede to the requisition of Congress, until this situation was remedied. This attitude of New Jersey created much alarm in Congress, a Congressional committee remonstrated with the legislature, and issued an address prepared by Charles Pinckney, advising New Jersey to urge the

<sup>1</sup> Mass. Resolves, 1785, 1786, p. 75.

<sup>2</sup> *Ibid.*, 1785, p. 32.

calling of a convention of all the States for the purpose of increasing the powers of the Federal Government, and rendering that government more adequate for the ends for which it was instituted.<sup>1</sup> Pinckney's advice bore fruit in the instructions which New Jersey gave to its delegates to the Annapolis Convention, empowering them to consider how far a uniform system in their commercial regulations and other important matters might be necessary to the common interest and permanent harmony of the several States, and these instructions, through the forethought of Hamilton and his associates at Annapolis, became the occasion for calling the Constitutional Convention.

Contemporaneously with the enactment of the State tariff laws, the Continental Congress was attempting to effect commercial treaties with France and other foreign powers, and it soon became plain that independent State legislation was as well a hindrance to the obtaining of the

<sup>1</sup> Bancroft, *Hist. Const.*, vol. i., pp. 256, 257. In a letter from the French *Chargé d'Affaires*, to Vergennes, 17th March, 1786, quoted in Bancroft, it is stated that the motive for this conduct on the part of New Jersey was jealousy of New York, "which by its position enjoys an advantage in carrying on a great part of its commerce, and which, by means of its customs duties, levies a sort of impost upon New Jersey and Connecticut. New York, not having acceded to the resolutions of Congress, derives a great advantage from its customs, and obliges its neighbors, which have no large commercial towns, to pay a part of the expenses of its government."



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treaties, as it was ineffective for retaliating against Great Britain; and thus, even before the calling of the Constitutional Convention, a general sentiment developed in and out of Congress, that the foreign and the interstate commerce were so closely connected as to prevent proper regulation of the former, and the securing of advantages in foreign trade, unless full power of regulating the latter were vested in Congress.<sup>1</sup>

The States [wrote Madison to Jefferson, in March, 1786],<sup>2</sup> are every day giving proofs that separate regulations are more likely to get them by the ears than to attain the common object. When Massachusetts set on foot a retaliation of the policy of Great Britain, Connecticut declared her ports free. New Jersey served New York the same way. And Delaware, I am told, has lately followed the example, in opposition to the commercial plans of Pennsylvania.

The evident remedy was a single control of commerce, but there was sufficient attachment to the system of government which had successfully ended the Revolutionary War, and distrust of a strong central government deep enough to defer a little longer the application of this remedy.

In the fifth essay of "The Continentalist,"

<sup>1</sup> Report of Committee of Congress, in May, 1785, in Sparks's *Washington*, ix., 503; McHenry's letter to Washington, Sparks, ix., 501.

<sup>2</sup> *Writings of James Madison* (Hunt), vol. ii., 227 *et seq.*

Hamilton had written that the position of the American States as "parts of a whole, with common interests in trade as in other things, indicates that there ought to be a common direction in that, as in all other matters." "It is easy to conceive," he writes, "that cases may occur in which it would be beneficial to all the States to encourage or suppress a particular branch of trade, while it would be detrimental to either [State] to attempt it without the concurrence of the rest, and where the experiment would probably be left untried for want of concurrence."<sup>1</sup>

Late in 1783, Virginia enacted a law, suggested by Madison, proposing only to give to Congress power to prohibit the importation into the United States of the growth or produce of the British West India Islands in British vessels, or to adopt any other mode which might most effectually counteract the designs of Great Britain with respect to American commerce.<sup>2</sup>

In December of the same year, the General Assembly of Pennsylvania, perhaps taking the hint from Virginia, instructed their delegates in Congress, that

as the local exercise within the States of the power of regulating and controlling trade can result only in discordant systems productive of internal jealousies

<sup>1</sup> *Works of Alexander Hamilton* (Lodge), vol. i., 258.

<sup>2</sup> *Virginia Laws, 1768-1783*, p. 211.

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and competitions, and illy calculated to oppose or counteract foreign measures, which are the effect of a unity of council, this house are clearly of opinion that the individual as well as general good will be best consulted by relinquishing to Congress all these separate and independent powers.<sup>1</sup>

" By the middle of 1785, opinion throughout the country seems to have quite generally advanced to willingness to confer upon Congress full powers of regulating both the foreign and the interstate trade." In some of the propositions of this period it is not explicitly stated whether the regulation of interstate or of foreign commerce, or of both, is intended, but in other proposals the intent to secure the regulation of both is emphatically expressed; and when the circumstances of the times, the experiences of the several communities which adopted the measures now to be referred to, and the contemporary effort in Congress to effect such amendment of the Articles of Confederation, as would vest Congress with the exclusive power of regulating interstate as well as foreign commerce, are considered, it seems probable that the authors of all the proposals intended to bestow upon Congress a complete and positive power of regulating interstate as well as foreign commerce.

In June, 1785, a Philadelphia town meeting resolved that relief from the oppressions under

<sup>1</sup> Bancroft, *History of the Constitution*, vol. i., 334.

which American trade and manufactures languished could spring only from the grant to Congress of full constitutional powers over the commerce of the United States; and duties upon foreign manufactures interfering with domestic industry were suggested.<sup>1</sup>

In this year, also, the Council of Revision of New York negatived a bill passed by the legislature to impose double duties upon all imports in vessels owned in whole or in part by British subjects, unless, for the purpose of encouraging navigation, such vessels were built in the State, upon the ground that "every attempt by a State to regulate trade without the concurrence of the others must produce injury to the State, without any general good; that partial duties would lead to countervailing duties, and that State legislation on this subject, would interfere with and embarrass the commercial treaties."<sup>2</sup>

A further advance toward the conviction that State regulation of interstate trade was harmful is shown by the resolution introduced by Madison in the Virginia House of Delegates, in November, 1785,<sup>3</sup> providing, among other things, that no State should be at liberty to impose duties on any goods imported by land or water from any other State, although it might altogether prohibit the

<sup>1</sup> Bancroft, *Const.*, vol. i., 187.

<sup>2</sup> Hamilton's *Republic*, vol. iii., p. 149.

<sup>3</sup> Elliot's *Debates*, i., 114.

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importation from any other State of any particular description of goods, of which the importation was at the same time prohibited from all places whatsoever. This resolution was tabled, but shows the point, at which Madison, at least, had arrived, and had its influence in bringing about the calling of the Annapolis Convention.

How far the unfavorable results of State regulation of commerce had led public opinion in at least one of the States, and that perhaps the most devoted of any to local autonomy, is indicated by the act passed by the Legislature of Rhode Island during the October session of 1785. In this enactment the delegates of that State in Congress were instructed to agree to and ratify any amendment of the Articles of Confederation,

by which the United States in Congress assembled shall be solely empowered to regulate the trade and commerce of the respective States, and the citizens thereof with each other; and to regulate, restrain, or prohibit, the importation of all foreign goods in any ships or vessels owned by any of the States, or by a citizen or citizens of either; and that the Article or Articles containing the powers aforesaid, or substantially agreeing therewith, when adopted by all the other States of the Union, shall be in force for the space of twenty-five years and no longer.<sup>1</sup>

<sup>1</sup> Rhode Island Schedules, 1785, at the session of the General Assembly begun on the last Monday in October, 1785, p. 10.

Had this proposal been favorably acted upon by the several States and by Congress, that body would have been vested with the exclusive control of both the interstate and the foreign commerce of the country, even to the extent of prohibiting all interstate trade in commodities of foreign origin, and it is an important indication of the purposes of the men of that day with respect to the vesting in Congress of power over commerce, that this proposition proceeded from the State the most intensely devoted of all to its local autonomy.

But contemporaneously with the commercial difficulties the Confederacy was failing in efficiency and nearing bankruptcy through its inability to compel the States to perform their obligations. The defect was seen by the larger minded men to lie in the wrong system of the government, and in accord with the principle, even then deeply settled in the public thought upon the origin of government, the means of providing the remedy was considered to be a general convention of all the States, to revise the Articles of Confederation. Whether to any one the credit for first clearly perceiving the need of, and first announcing this remedy can be fairly given,—whether to Alexander Hamilton, or to Pelatiah Webster,—or whether it was rather a conviction in the air, at least Hamilton was one of the first to perceive and declare the need of such a convention. In his letter to

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Robert Morris, of April 30, 1781, said by some to have been the origin of the first national bank incorporated under authority of the Continental Congress, he accompanied the argument for the bank, and for permanent funds, with perhaps the most explicit demand for a convention to provide a new Constitution which had yet been made.

They [Congress], [he wrote] must demand an instant, positive, and perpetual investiture of an impost on trade; a land tax and a poll tax to be collected by their own agents to become a part of the Confederation. . . . It has ever been my opinion, that Congress ought to have complete sovereignty in all but the mere municipal law of each State, and I wish to see a convention of all the States, with full power to alter and amend, finally and irrevocably, the present futile and senseless Confederation.<sup>1</sup>

In the year preceding "The Continentalist," delegates from the four New England States and New York, in convention at Hartford, prepared an address to their respective States and to Congress, calling upon the latter to propose the levy of certain taxes on specific articles, or duties on imports, for the purpose of discharging certain current liabilities of the Confederacy. The several States were to invest Congress with the power to levy and collect the duties, taxes, or imposts within their respective boundaries, and their

<sup>1</sup> *Works of Alexander Hamilton* (Lodge), iii., 116.

delegates in Congress were to pledge the faith of their States to the passage of such laws as were needed to give effect to these recommendations. In a circular letter to the States, also prepared by the Convention, the difficulties of their present situation were attributed, in great measure, to the lack of the "power of coercion" in the central government—a phrase the significance of which, as indicating the trend of thought of the time, increases when it is compared with the explanations given by Washington and others of the causes of the disorders in the Eastern States in 1786–1787. The letter recites that

all government supposes a power of coercion. This power, however, in the general government of the Continent never did exist or, which has produced equally disagreeable consequences, never has been exercised. We shall, however, be without a solid hope of peace and freedom unless we are properly cemented among ourselves, and although we feel the calamities of war, yet we have not sufficient inducements to wish a period to them, until our distresses, if other means cannot effect it, have, as it were, forced us into an union.<sup>1</sup>

In July, 1782, the Legislature of New York passed a resolution drafted by Hamilton, which after referring to the defects of the Confederation in not granting to Congress sufficient power

<sup>1</sup> J. C. Hamilton's *History of the Republic of the United States*, ii., 98, 198, 199.



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to effectuate that ready and perfect co-operation of the different States on which their immediate safety and future happiness depend, and particularly in not vesting the Federal Government either with a power of providing revenue for itself, or with ascertained and productive funds, secured by a sanction so solemn and general as would inspire the fullest confidence in them, and make them a substantial basis of credit,

resolved that it be proposed to Congress to recommend, and to the several States to adopt, the measure, of calling a general convention of all the States especially authorized to revise and amend the Articles of Confederation.<sup>1</sup>

In his *Dissertation on the Political Union and Constitution of the Thirteen United States of America*, published in February 1783, Pelatiah Webster suggested a general convention to formulate a constitution conformable to the maxims stated by him. He laid it down as his

first and great principle, that the Constitution must vest powers in every department sufficient to secure and make effectual the ends of it. The supreme authority must have the power of making war and peace, of maintaining armies and navies, of appointing officers, both civil and military, of making contracts, of emitting, coining, and borrowing money, of regulating trade, of making treaties with foreign powers, of establishing post-offices, in short, of doing everything

<sup>1</sup> *Works of Alexander Hamilton* (Lodge), i., 277 *et seq.*

which the well being of the Commonwealth may require, and which is not compatible with the powers granted to any particular State.<sup>1</sup>

Early in 1783, a proposition was under consideration for a convention of the Eastern States and New York, to assemble upon the invitation of Massachusetts, for the purpose of regulating their mutual trade and other interests. In April of that year, it was explained in the Continental Congress, where it excited much alarm, that the measure was intended to guard against the interference of taxes among the States, whose local situation required such precautions. In the discussion which followed Hamilton hoped to soon present to Congress, in pursuance of instructions from his constituents, a plan to strengthen the Federal Constitution.<sup>2</sup>

In the summer of 1785, Governor Bowdoin, of Massachusetts, in a message to the State Legislature, urged the importance of vesting Congress not only with the power of regulating trade, but "with all the powers necessary to preserve the Union, manage the general concerns of it, and secure and promote the common interests"; and he proposed a general convention of the States to

<sup>1</sup> Quoted from Hannis Taylor's article in the *North American Review*, for August 16, 1907. See also Taylor's *A Memorial in Behalf of the Architect of the Federal Constitution, Pelatiah Webster, of Philadelphia, Penn.*, 1907.

<sup>2</sup> *Madison's Writings* (Hunt), vol. i., 438, 439.

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amend the Articles of Confederation to this end.<sup>1</sup> Pursuant to this suggestion, the State Legislature, in July 1785, resolved that "the powers of Congress [were] not fully adequate to the great purposes they were originally designed to effect," and that Congress be urged to recommend a convention of all the States "to revise the Confederation, and report to Congress how far it might be necessary in their opinion, to alter or enlarge the same, in order to secure and perpetuate the primary objects of the Union."<sup>2</sup> This resolution was sent, together with a circular letter from Governor Bowdoin, to the Governors of all the States and to the Massachusetts delegates in Congress, to be submitted to that body. But the delegates (Elbridge Gerry, S. H. Holten, and Rufus King), refused to submit them, and upon their urgency they were rescinded and no further action taken.

In the meantime, however, Congress was responding to the public demand, various propositions for enlarging the powers of Congress were being brought forward in that body, to which attention will be directed in the next chapter; the convention at Annapolis met and reported, the disorders of 1786-1787 broke out, the resistance of the conservative element in Congress to a general assembly yielded, and the convention met at Philadelphia determined to accomplish much more than enlargement of the power of Congress over commerce.

<sup>1</sup> Massachusetts Resolves, 1785-1786, p. 70.   <sup>2</sup> *Ibid.* 38 and 39.

## CHAPTER III

PROPOSALS IN CONGRESS FOR ENLARGING THE  
POWER OF THAT BODY OVER COMMERCE—ORI-  
GIN OF THE DEFINITE MOVEMENT FOR EN-  
LARGEMENT OF POWER IN A PROHIBITORY  
MEASURE—THE REPORT OF MONROE'S COM-  
MITTEE IN 1785—THE REPORT OF PINCKNEY'S  
COMMITTEE IN 1786

THE proposals in Congress for enlarging the powers of that body over commerce went through a development from 1781 to 1786, similar to that which we have seen proceeding in the country. In Congress, as out of it, the development virtually began with the representations of New Jersey; for John Witherspoon's motion of February 3, 1781, conformed to the principle of the representations, he being a delegate from that State. His motion recited that it was indispensably necessary that the United States in Congress assembled should be vested with a right "of superintending the commercial regulations of every State, that none might take place that shall be partial or contrary to the common interest"; and granted to Congress the ex-

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clusive right of laying duties upon all imported articles; no restriction, however, to be valid and no duty to be laid without the consent of at least nine States.<sup>1</sup>

The motion was ahead of its time, opinion in Congress had not developed sufficiently to support it, and that body was on this very date occupied with the Report of the Committee of the Whole on the Revenue. The motion was therefore defeated,<sup>2</sup> and contributed nothing to subsequent efforts to enlarge the powers of Congress.

Disregarding Witherspoon's motion and neglecting the revenue measures, the permanent movement for enlarging Congressional control over commerce began in that body with the recommendation of a prohibitory measure, in the report of the committee of which Thomas Jefferson was chairman, in April 1784, advising that the legislatures of the several States vest the United States in Congress assembled for the term of fifteen years with the power to prohibit the importation of goods, wares, or merchandise into, or the exportation thereof from, any of the States, in vessels belonging to the subjects of any power with which the United States had no treaties of commerce, and also advising the vesting in that body, for the same term, of authority to prohibit

<sup>1</sup> Journals of Congress, vii., 25, 26    The motion is in Elliot, i., 92.

<sup>2</sup> Journals of Congress, vii., 26.

the subjects of any foreign power with which the United States had no such treaties, from importing into the United States any goods, wares, or merchandise not the produce of the dominion of the sovereign whose subjects they were. The report also recommended that to all acts passed in the exercise of the recommended powers, the assent of nine States should be necessary.<sup>1</sup>

The power proposed to be vested in Congress was manifestly a great and positive one; it would be considered to-day a dangerous and tyrannous one. Yet the principle of the recommendation originated in Virginia, in 1783, seems to have aroused little opposition when first suggested in Congress, and to have come into general favor by 1786.<sup>2</sup> The assent of the several States, however, to the general principle was attended by such various and contradictory provisions as to details, that the proposal failed to become a law, and the movement in its favor became merged in the wider propositions of the Annapolis Convention. But it is significant of the scope which the opinion of the country in 1781 to 1786 assigned to that regulation of commerce which it was then desired should be vested in Congress, that the movement to secure the greater power to that

<sup>1</sup> Journals of Congress, ix., 186, 187; Elliot, i., 106, 108.

<sup>2</sup> See the Report of the Congressional Committee of March 31, 1786, on the state of the measure at that time, Journals of Congress, xi., 31.

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body really began with the recommendation of a prohibitory measure.

The proposals in Congress next advanced to the vesting in that body of complete control over both foreign and interstate trade, the report of the committee of which James Monroe was chairman recommending, in the spring of 1785, an amendment to the Articles of Confederation to attain this result.<sup>1</sup> The conviction of the necessity of speedy action upon the recommendation, which characterizes the report, was due principally to the great contemporaneous development of the West, fear of its drifting away from the Union, and anxiety as to the effect its addition to the Confederation might have upon measures favored by the seaboard communities. For men were already realizing somewhat of the great future of the lands beyond the Alleghanies, and were fearful that the interests of that region might conflict with the welfare of the older settlements, and prevent the enactment of the commercial measures which the latter desired. Monroe had recently made a journey into Western New York, and to the Great Lakes, one of his objects being to "take into his view the practicability of communications from Lake Erie down the Potomac." He also had in mind, about this time, the examination of the route from Fort Pitt to Lake

<sup>1</sup> *Writings of James Monroe* (Hamilton's edition), vol. i., pp. 80 to 83.

Erie.<sup>2</sup> He was in correspondence with Governor Harrison of Virginia, to whom Washington had addressed his now famous letter on Western communications a few months earlier, and with Thomas Jefferson, who about this date was also much concerned over the opening of highways of trade between Virginia and the new communities. Monroe was, therefore, fully advised, at the time of the report, upon the western situation, and the perils thought to lurk in it for the Union. In the report he sought to arouse Congress and the State legislatures to the speedy action upon its recommendations which he considered necessary.

The situation of the commercial affairs of the Union [says the report] requires that the several legislatures should come to the earliest decision on the subject, which they [the committee] now submit to their consideration. They have weighed it with that profound attention, which is due to so important an object, and are fully convinced of its expedience. A further delay must be productive of inconvenience. The interests which will rest in every part of the Union must soon take root and have their influence. The produce raised upon the banks of the great rivers and lakes which have their source high up in the interior parts of the continent will empty itself into the Atlantic in different directions, and of course, as the States growing up at the westward attain maturity and get

<sup>2</sup> Monroe to Jefferson, *Writings of Monroe*, vol. i., 39, 40; to Governor Harrison, vol. i., 39.



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admission into the Confederacy will their government become more complicated. Whether this will be the source of strength and wealth to the Union, must therefore in great degree depend upon the measures which may now be adopted . . . and while the interests of each State and of the Federal Government continue to be the same, the same evils will always require the same correction, and of course the necessary powers should always be lodged in the same hands. They have therefore thought proper to propose an effective and perpetual remedy.<sup>1</sup>

The resolutions accompanying the report, after revision in the Committee of the Whole, recommended that the ninth article of the Confederation be amended to provide that the United States in Congress assembled should have "the sole and exclusive right and power of determining on peace and war except in the cases mentioned in the sixth article, of sending and receiving ambassadors, entering into treaties and alliances, of regulating the trade of the States, as well with foreign nations as with each other, and of laying such imposts and duties upon imports and exports as may be necessary for the purpose"; provided, however, that the legislative power of the several States should not be restrained from prohibiting the importation or exportation of any species of goods or commodities whatever, that

<sup>1</sup> *Writings of James Monroe* (Hamilton), vol. i., p. 83.

all duties imposed should be collected under the authority and accrue to the use of the State in which the same should be payable, and that every act of Congress for effectuating the purposes of the amendment should have the assent of nine States in Congress assembled.<sup>1</sup> Sufficient opposition developed in Congress to defer action on the recommendation until the spring of 1786, and the subject then became merged with the measures to be discussed at Annapolis.<sup>2</sup>

But the movement in Congress was not permitted to die out, for the urgency of Charles Pinckney procured from the subcommittee of the Grand Committee of the Continental Congress, in August 1786, a report recommending among other things the addition of a new article to the Confederation, to be numbered fourteen, by which a power similar to that proposed by Monroe's committee in the previous year was to be vested in Congress. It, however, went farther than the proposal of 1785, in limiting the authority of the States to collect the duties which might be imposed by Congress, and in restricting their right to impose embargoes to times of scarcity. The proposed Article read as follows:

Art. 14: The United States in Congress assembled shall have the sole and exclusive power of regulating

<sup>1</sup> *Writings of James Monroe* (Hamilton), vol. i., pp. 80 to 83. Sparks's *Washington*, ix., 503; Elliot's *Debates*, i., p. 111.

<sup>2</sup> *Writings of Monroe*, vol. i., 95, 96, 101, 127.

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the trade of the several States, as well with foreign nations as with each other, and of laying such prohibitions, and such imposts and duties upon imports and exports as may be necessary for the purpose; provided that the citizens of the States shall in no instance be subjected to pay higher duties and imposts than those imposed on the subjects of foreign powers: provided also that all such duties as may be imposed shall be collected under such regulations as the United States in Congress assembled shall establish consistent with the constitutions of the States respectively, and to accrue to the use of the States in which the same shall be payable; provided, also, that the legislative power of the several States shall not be restrained from laying embargoes in time of scarcity; and provided, lastly, that every act of Congress for the above purpose shall have the assent of nine States in Congress assembled, and in that proportion when there shall be more than thirteen in the Union.<sup>1</sup>

The phrases in which these resolutions are expressed indicate very clearly the intentions of the respective committees as to the scope of the powers to be vested in Congress:

The United States in Congress assembled shall have the sole and exclusive right and power . . . of regulating the trade of the States, as well with foreign nations as with each other, and of laying such imposts and duties upon imports and exports as may be necessary for the purpose (Monroe's Committee).

<sup>1</sup> Bancroft, *Hist. Const.*, vol., ii., pp. 373-377.

The United States in Congress assembled shall have the sole and exclusive power of regulating the trade of the several States, as well with foreign nations as with each other, and of laying such prohibitions and such imposts and duties upon imports and exports as may be necessary for the purpose (Pinckney's Committee).

The words, "sole and exclusive," used in each of these resolutions, are known to the lawyer to be peculiarly appropriate to that case in which it is intended to (1) invest one of the parties to an agreement with the complete control over the subject in question, and (2) divest the other party of all share in that control. The lawyer is rarely able to foresee all that time may determine should be included under, or directly connected with, the subject of negotiation; and when it is his intention to secure to his client complete control over all that the future, according to the development of the arts, the changes of society, and the enlarging understanding of men, may ascertain to be within that subject, then the peculiarly apt phrase is that employed in both of these resolutions. Monroe and Pinckney were lawyers, and conversant with this technical significance of the terms used. This, or other equivalent phrases, had also come to be much used in documents of that day by those who desired to take control over some subject wholly from the States, and vest it wholly in the Confederacy.

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Thus, when the legislature of the State of New Jersey desired to take all authority over foreign commerce from the several States, and confer it wholly upon Congress, their words were:

We are of the opinion that the sole and exclusive power of regulating the trade of the United States with foreign nations ought to be clearly vested in Congress.

And Witherspoon's Resolution sought to take from the States all power over the levying of duties on imports, and bestow all upon the Congress, by vesting Congress "with the exclusive right of laying duties on all imported articles;" while the legislature of the State of Rhode Island suggested the transfer to the Union of complete control over interstate trade, by advising an amendment to the Articles of Confederation, "by which the United States in Congress assembled [should] be solely empowered to regulate the trade and commerce of the United States, and the citizens thereof, with each other."

Thus, whether we consider only the ordinary meaning of the terms in the resolutions of Monroe's and Pinckney's committees, or compare them with current usage in cases as to which there is no doubt of the intent to confer upon Congress an authority over a commercial subject, which is at once complete in itself, and exclusive of the power of the States, we are led to conclude, that the sponsors of these resolutions intended to con-

fer upon Congress as complete a power over both branches of commerce as language could express. Only this conclusion is in harmony with the phrases used; the opposite compels us to do violence to the plain meaning of words. Nor does Monroe leave us in doubt as to how he understood the resolution of his committee. Thus, in explaining his preference for the measure proposed by his committee over other expedients, such as commercial treaties, he writes to Jefferson on January 19, 1786: "Every expedient is unquestionably inferior to the complete and absolute control over commerce in the hands of the United States."<sup>1</sup>

To Madison he writes on December 26, 1785, "I am perfectly satisfied that the more fully the subject is investigated, and the better the interests of the States severally are understood, the more obvious will appear the necessity of committing to the United States permanently the power of regulating their trade."<sup>2</sup>

In a letter to Jefferson, of June 16, 1785, he thus comments upon the relation of the powers, which this measure would confer upon Congress, to the power at that time possessed by the States:

The political economy of each State is entirely within its own direction, and to carry into effect its regulation with other powers to attain any substantial ends to the State, they must apply as well to the

<sup>1</sup> *Writings of James Monroe* (Hamilton), vol. i., p. 116.

<sup>2</sup> *Writings of James Monroe*, vol. i., 109.

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States of the Union as other powers, and such a course as this will produce very mischievous effects. On the other hand, the effect of this report would be to put the commercial economy of every State entirely under the hands of the Union, the measure necessary to obtain the carrying trade, to encourage domestic by a tax on foreign industry, or any other ends which, in the nature of things, become necessary, will depend entirely on the Union. In short, you will perceive that this will give the Union an authority upon the States respectively, which will last with it and hold it together in its present form longer than any other principle it now contains will effect. I think the expedience in a great degree of the measure turns on one point (especially to the Southern States), whether the obtainment of the carrying trade and the extension of our national resources is an object. And this depends entirely upon the prospect of our connection with other powers.<sup>1</sup>

As to Pinckney, it is probable that at the date of his committee's report he was already engaged in the study of the state constitutions, which resulted in his draft of a constitution for the United States; and we know that his regard for the rights of the States at this period was only such as was compatible with his insistence, the next year in the Constitutional Convention, upon the necessity of vesting Congress with the right of negativing all laws whatever of the several

<sup>1</sup> *Writings of James Monroe*, vol. i., 85.

States. There is nothing in what we know of Pinckney's thinking upon public questions, at this date, to suggest that he gave any more limited meaning to the terms of his resolution than they naturally have.

So far, then, as the reports of these committees represented contemporaneous opinion as to the extension of the commercial powers of Congress, that opinion favored the vesting in that body of the same complete and exclusive control over the interstate as over the foreign commerce. Neither Monroe, nor Pinckney, nor any of their contemporaries foresaw the great development of the arts, and of the influence of the central authority, which have made the power over interstate commerce, perhaps, the greatest possessed by the national government,—a power so great, that it may even become a menace to the local self-government of the States. But so far as they did foresee, they intended to sweep the whole field of regulation of interstate commerce into the power of Congress; and they deliberately, as lawyers, as well as statesmen, made use of terms adapted to include within that power whatever the future determined, although unforeseen by them, it should from time to time include.



## CHAPTER IV

### THE DEVELOPMENT OF THE WEST—ITS EFFECT UPON THE MOVEMENT TO ENLARGE THE COMMERCIAL POWERS OF CONGRESS

THE report of Monroe's committee is but one of numerous indications that the great contemporary development of the West was opening men's minds to larger conceptions of the future of the Union, and to the recognition of the necessity of vesting Congress with powers adequate to the regulation of a great internal trade. "The West" has signified different localities to different generations. For more than a century the relation to the eastern communities of the region and the people designated by that term greatly influenced national legislation, and gave a continental breadth to the thoughts of men concerning the nature and ends of government, which otherwise would have remained narrowly local. "As we are laying the foundation of a great empire," said Rutledge in the Constitutional Convention, when opposing the proposition that laws regulating commerce should require two-thirds majorities, "we ought to take a per-

manent view of the subject, and not to look at the present moment only"<sup>1</sup>; and in this saying he voiced an opinion which contemporary events were pressing into the thoughts of all large-minded men of his day.

In the years immediately preceding the framing of the Constitution, "the West" signified particularly the region now covered by the States of Kentucky and Tennessee and the territory northwest of the Ohio River, and occurrences in that locality were forcing upon the Confederation the serious problem of permanently attaching it to the Union. From 1781 to the passage of the "Ordinance for the government of the territory of the United States northwest of the river Ohio,"<sup>2</sup> in 1787, men's thoughts had been much occupied with the nature of the government to be erected in that territory; from 1783 to 1788 the settlement of the whole western region was proceeding with great rapidity; as the date of the Convention approached, the danger that it would drift away from the Confederacy to England or Spain was thought to be serious, and the best means of preventing its loss seemed to the men of the day the increasing of facilities of trade between it and the older parts of the Union. To the leaders early action by the Confederation seemed necessary, and for two reasons: unless wise

<sup>1</sup> *Documentary History of the Constitution*, vol. iii., 641.

<sup>2</sup> U. S. Revised Statutes, 13.

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action were quickly taken, the West might become permanently alienated from the Confederacy; and unless action were taken before new States were erected in that region, the effect of the added members of the Confederacy might be to modify the proposed alterations of the Confederation in a manner not desired by the older communities.

We have seen that Monroe was keenly alive to the situation. That Madison also perceived that the relation of the West to the Union required speedy action in enlarging the commercial powers of Congress, is shown by his letter to Jefferson, of March 1786, in which he writes that, "of two considerations which particularly remonstrated against delay," one was "*the probability of an early increase of the confederated States which more than proportionally impede measures which require unanimity, as the new members may bring sentiments and interests less congenial with those of the Atlantic States, than these of the latter are with one another.*"<sup>1</sup> That Washington also had great anxiety over the outcome is indicated by his correspondence to be presently quoted. And there was a special occasion for their fears in the western unrest over the question of the free navigation of the Mississippi. In Kentucky and Tennessee, and quite generally in the western settlements, there was a strong desire to obtain from Spain the right of free navigation of the

<sup>1</sup> *Writings of James Madison* (Hunt), vol. ii., 229-230.

lower parts of that river; but in the East, both in and out of Congress, opinion was much divided as to whether it were more desirable to strive for this, or for the improvement of direct routes of communication between the western settlements and the Atlantic seaboard; and it was thought by Washington and others that, upon the whole, the interests of the Union would be better promoted by the latter course. Richard Henry Lee, then President of the Continental Congress, in a letter to Washington, in the summer of 1786, indicates a willingness on the part of that body to conclude the pending treaty with Spain by waiving the free navigation of the Mississippi,<sup>1</sup> and Washington was, at this time, of the opinion, that the improvement of trade communications between the Atlantic States and the Western Territory was more urgent than the securing of the free navigation of that river.<sup>2</sup>

Washington probably knew the Western country better, and appreciated its relation to the Union with broader mind than any other public man of his generation. At least since 1774, he had been reflecting upon the promotion of its trade with the coast settlements. He had also a personal interest in it, through his holdings of

<sup>1</sup> Lee to Washington, in the *Writings of George Washington*, collected and edited by Worthington Chauncey Ford, vol. xi., p. 42.

<sup>2</sup> Washington to Lee, 18th June, 1786, Ford's *Writings of Washington*, xi., pp. 41 and 42.

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large tracts of lands in localities which would be favorably affected by proposed trade routes<sup>1</sup> and the contemplation of the great future of the West roused his equal mind to a rare poetic enthusiasm, so that he wrote of it as that "rising world." He had reached the settled conviction, that the West could only be permanently attached to the Union by improving the trade communications between them, and his advocacy of internal improvements was part of his wise political forethought. In a letter to Samuel Purviance, of the 10th March, 1786, he thus explains his interest in various projects of river improvement:

This [the James River project], equally with the extension of the Potomac navigation, was a part of my original plan and equally urged by me to our Assembly; for my object was to connect the Western and Eastern or Atlantic States together by strong commercial ties. . . . All of them [the various projects] have my best wishes; for as I have observed already, my object and my aim are political. If we cannot bind these people to us by interest, and it is not otherwise to be effected but by a commercial knot, we shall be no more to them after a while than Great Britain or Spain, and they may be as closely linked with one or other of those powers as we wish them to

<sup>1</sup> See Washington's letters to Purviance, Witherspoon, Slaughter, and others, in Washington's *Writings* (Ford), viii., 6; x., 362; xii., 103; (Sparks) X., 220.

be with us, and in that event, they may be a severe thorn in our side.<sup>1</sup>

In 1784, he had expressed the same sentiments even more forcibly in a letter to George Plater.<sup>2</sup>

But I consider [he had then written] the business of improving trade routes in a far more extensive point of view; and the more I have revolved the subject, the more important it appears to me; not only as it respects our commerce, but our political interest and the well being and strength of the Union also.

And noting the projects promoted by various States, both by water and over land, for smoothing the roads and paving the way

for the trade of that Western World to their capital, . . . I am not [he writes] for discouraging any State to draw the commerce of the Western country to its seaports; the more communications are open to it, the closer we bind that rising world (for indeed it may be so-called) to our interests, and the greater strength shall we acquire by it; . . . but the political object of it in my estimation is immense.

I need not remark to you, sir, that the flank and rear of the United Territory are possessed by other powers and formidable ones, too; nor how necessary it is to apply the cement of interest to bind the several parts of it together; for what ties, let me ask, should

<sup>1</sup> *Writings of Washington* (Ford), xi., 20, 21.

<sup>2</sup> Washington to Plater, 25 Oct., 1784, in Bancroft, *Hist. Cons.*, i., 385.

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we have upon those people, and how entirely unconnected must we be with them, if the Spaniards on their right, or Great Britain on their left, instead of throwing stumbling blocks in their way, as they now do, should invite their trade and seek alliances with them. What, when they get strength, which will be sooner than is generally imagined from the emigration of foreigners, who can have no predilection for us, as well as from the removal of our own citizens, may be the consequence of their having formed close connection with both or either of those powers in a commercial way, needs not the gift of prophecy to foretell. . . . But, open the road once and make easy the way for them, and see what an influx of articles will be poured in upon us; how amazingly our exports will be increased by them, and how amply we shall be compensated for any trouble and expense we may encounter to effect it.

Washington was alone in the breadth of his views concerning the political bearings of improved trade communications, but others were as eager for the improvements because of the immediate commercial advantages. There was much rivalry among the Eastern States in their efforts to control highways of trade with the West, and numerous proposals of routes to direct that trade to one or another of the older States were advanced in the years immediately preceding the meeting of the Convention. The foregoing extracts from Washington's correspondence have indicated this, and it is more explicitly set forth by Jefferson in his

letter to Madison of February 20, 1784, in which, explaining the importance to Virginia of retaining her territory to the meridian of the mouth of the Kanawha, he advances among other reasons, that the Ohio and its branches,

which head up against the Potomac, affords the shortest water communication by five hundred miles of any which can ever be got between the western waters and Atlantic, and, of course, promises us almost a monopoly of the Western and Indian trade. I think the opening of this navigation is an object on which no time is to be lost. Pennsylvania is attending to the western commerce. She has had surveys made of the river Susquehanna, and of the grounds through which a canal must pass to go directly to Philadelphia. It is reported practicable at an expense of £200,000 and they have determined to open it. What an example this is! If we do not push this matter immediately, they will be beforehand with us, and get possession of the commerce. And it is difficult to turn it from a channel in which it is once established.<sup>1</sup>

This realization of the importance of providing for trade with the West was due to the extraordinary contemporary development of the new settlements.

The people east of the mountains, released from a long and unnatural war, and having only partially recovered from the consequent depression, after

<sup>1</sup> Quoted from Bancroft, *History of the Constitution*, vol. i., 344-345; *Writings of Thomas Jefferson* (Ford), iii., 402.



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peace had been restored with the Indian tribes, sought ease and fortune in the West. The tide of emigration began to set with unprecedented rapidity from the Atlantic settlements across the mountains and down the Ohio River. The roads from Cumberland and Bedford to Pittsburg and Brownsville were traversed by continued and successive groups of emigrant colonies, with their long lines of family wagons followed by herds of cattle, hogs, all kinds of stock, and the necessary appendages for agricultural life.<sup>1</sup>

It is estimated that in 1784, 30,000 settlers came into the valley of the Ohio, southern side, from Virginia and North Carolina. The census of 1790 gave to Kentucky 73,677 inhabitants.<sup>2</sup> Monette estimated the population at more than 80,000, and John Brown in a letter to Jefferson of August 10, 1788, claimed 100,000.<sup>3</sup> A consequence of this growth of population was considerable increase of trade between the new settlements and older communities. "Wheat fields and cornfields and orchards began to spring up in every direction, and already the wagons that brought out merchandise from Philadelphia went back laden with grain."<sup>4</sup>

Nor was this great western development con-

<sup>1</sup> Monette, *History of the Valley of the Mississippi*, vol. ii., p. 146.

<sup>2</sup> *Ibid.*, cited, pp. 177, 163.

<sup>3</sup> Bancroft, *Const.*, vol. ii., p. 477.

<sup>4</sup> McMaster, *History of the American People*, vol. i., p. 149.

fined to the southern side of the Ohio River; it was turning also to the northern, and during the sessions of the Constitutional Convention measures were concluding which were presently to give an extraordinary impetus to the settlement of the regions north of that river. The principal agent in this movement was the Ohio Company, an association originally formed in New England to afford opportunities to officers of the Revolutionary Army to better their condition by removing to the Ohio valley. Members of Congress and of the Convention were interested in its project; its contract with Congress was closed in the summer of 1787, and was closely connected with the passage of the Northwest Ordinance; and its operations tended to strongly direct the thoughts of the men of the Convention toward the importance of the power of regulating trade between the eastern communities and its settlements.

The journals and correspondence of Manasseh Cutler, the principal agent of the Company in its negotiations with Congress, and other letters and documents of the time, show clearly how deeply the idea of the growth of trade between the older States and the new settlements was then occupying the thoughts of the leading men,—how deeply, in fact, their own fortunes were concerned in various projects of western settlement.

It was the original plan of the association of

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the Ohio Company to purchase from Congress about 1,500,000 acres of land in the Ohio valley for about \$1,000,000, and to settle colonists from New England on the purchase. The prospect of receiving such a sum of money seemed, at first, to the almost bankrupt Congress a godsend, but presently, according to Cutler, various obstacles were put in the way of the contract, until the Company was induced to increase the amount of their purchase from 1,500,000 acres to 5,000,000 acres, of which, 3,500,000 acres were to go to a second company in which members of Congress were secretly interested. Upon this basis, the contract was entered into during the summer of 1787, and the Company immediately began the work of settlement around the present city of Marietta.<sup>1</sup>

<sup>1</sup> In his Journals Cutler says, that the Ohio Company obtained one million and a half of acres and the remainder of five million acres for "a private speculation in which many of the principal characters in America were concerned. Without connecting this speculation similar terms and advantages could not have been obtained for the Ohio Company." (*Cutler's Life, Journals, and Correspondence*, by his grandchildren, William Parker Cutler and Julia Perkins Cutler, Cincinnati, 1888, Vol. i., p. 305.)

Under date of July 30, 1787, Cutler writes that Col. Duer came to him "with proposals from a number of the principal characters in the City to extend the contract, and take in another company, but that it should be kept a profound secret. He explained the plan they had concerted and offered me generous conditions if I would accomplish the business for them. The plan struck me agreeably." Cutler, vol. i., p. 295.

The plans of the Ohio Company were considered of great political, as well as economic, importance, their enterprise stimulated other settlements, and western emigration became the rage. Carrington, a member of Congress, proposing to invest in the shares of the Company writes Monroe, in August 1787, that the Company would be the means of "introducing into the country, in the first instance, a description of men who will fix the character and politics throughout the whole territory, and which will probably endure to the latest period of time."<sup>1</sup> And about the same date Grayson writes: "As their objects are actual settlement and defence, there is every reason to conclude it will be of the greatest advantage to that country." And he expresses the opinion that in a few years the Company will be extended by additional purchases quite to the Mississippi, thereby forming a complete barrier for Virginia, and greatly "validating" the lands on the Virginia side of the Ohio.<sup>2</sup> In other letters, Grayson notes other grants of large tracts of land in the Ohio valley and on the banks of the Wabash, and says that a very considerable emigration will take effect from the five easternmost States. "A brigade files

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The Ordinance authorizing the contract with the Ohio Company was passed by Congress, July 27, 1787.

The settlement at Marietta was made April 7, 1788. Cutler, vol. i., p. 148.

<sup>1</sup> Bancroft, *Const. Hist.*, vol. ii., p. 436.

<sup>2</sup> *Ibid.*, 437, 438.

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off from Massachusetts immediately, which is to be followed by much more considerable ones next spring and fall."<sup>1</sup>

As indicated by Grayson, the project of the Ohio Company was followed in the same year, 1787, by other schemes for western settlement, of such magnitude, that Otto, French *chargé d' affaires*, at New York, writes to Montmorin in October and November 1787, that "a great number of adventurers are flocking thither to form settlements there. The excess of population in the Northern States, and all the discontented are journeying thither in crowds, and the banks of Ohio will soon be covered with plantations."<sup>2</sup> He notes that a large settlement has been made on the Mississippi, between the Illinois River and that of the Kaskaskias; "it is proposed to build a town, very nearly opposite to the Missouri, whither they count upon attracting all the fur trade which descends that great river. There is always something of the wonderful in these projects, but there is perhaps no civilized nation which changes its habitation more readily than the Americans, and which founds settlements more rapidly."<sup>3</sup>

Few public men of that day could be indifferent to the consequences of movements of such magni-

<sup>1</sup> Bancroft, *Const.*, vol. ii., pp. 439, 445.

<sup>2</sup> *Ibid.*, p. 447.

<sup>3</sup> *Ibid.*, p. 450.

tude. But their emotions differed greatly. In Washington, as we have seen, these events produced high hopes of a great national future. To him they were the signs of a rising world, of the dawning of a great American empire; but the same events inspired others with grave anxieties. The older communities had fought the Revolution, established the Confederation, and conducted it until now; might it not be that these new regions, so much larger in extent, would deprive the older States of their pre-eminence, and introduce political ideas to which they were opposed? To such men, the West was "the embryo of new connections, a vast political field [they] dare not explore."<sup>1</sup>

These hopes and fears were reflected in the Constitutional Convention. Rutledge and Madison saw in the western movements reasons for building the framework of the government in such permanent form as would provide for the future.<sup>2</sup> But Gouverneur Morris proposed to give to Congress power to admit the Western States into the Union upon a different basis than that of the older States, so that their influence might be curtailed and their supremacy prevented<sup>3</sup>; while Clymer thought that to encourage the

<sup>1</sup> Crevecoeur to Jefferson, Oct. 20, 1788, in Bancroft, *Hist. Const.*, vol. ii., p. 482.

<sup>2</sup> For Madison, *Documentary History of the Constitution*, vol. iii., p. 543; for Rutledge, p. 641.

<sup>3</sup> *Documentary History*, iii., 305.

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western country would be suicide for the older States<sup>1</sup>; and the history of the times contains numerous references to the jealousies of the older communities at the departure of swarms of their inhabitants to the western country. But whether in hope or in fear, the consequences of the Western connection deeply occupied men's thoughts on the eve of the Constitutional Convention, and enlarged their comprehension of the scope of the new Constitution from a plan for regulating the affairs of a few small communities along the Atlantic coast to one for governing an empire.

Not only, however, were the relation of the West and the importance of its trade uppermost in men's minds on the eve of the Convention, but vehicles of internal commerce altogether surpassing what the world had before known, were just then also coming to their knowledge. For it is a curious coincidence in our history, that, just as the new settlements were thus enlarging the conceptions of men as to the purposes of the new government, the invention, or re-invention, of the steamboat should have inspired them with the expectation of a more efficient contrivance for conducting the internal trade of the country than anything yet known to the world.

Rumsey and Fitch had brought out their respective inventions shortly before the meeting of the Convention. Their rival claims had been

<sup>1</sup> *Documentary History*, iii., 633.

urged upon the Continental Congress and the legislatures of several States, some of which had granted monopolies to the one or the other inventor for the use of their respective improvements on vessels navigating the waters of the enacting States. The inventors asserted, and prominent men of the time recognized, the great importance of the improvements to the internal trade of the country. Thus Washington, in his certificate to Rumsey, in 1784, speaks of the invention as of the greatest usefulness to internal navigation.<sup>1</sup> Dr. John Ewing, Provost of the University of Pennsylvania, commending Fitch's invention to William C. Houston, formerly a member of the Continental Congress, wrote in 1788: "Should such a machine be brought into common use in the inland navigation through the United States, it would be exceedingly advantageous in transporting the productions of America to market, and thereby greatly increase the value of our back lands."<sup>2</sup> Andrew Ellicott, of Philadelphia, wrote, after seeing Fitch's boat on the Delaware, in 1787, "I am fully of the opinion that steamboats may be made to answer valuable purposes in facilitating the internal navigation of the United States, and that Mr. Fitch has great merit in applying the steam engine to so valuable a purpose"<sup>3</sup>; and in a

<sup>1</sup> *Writings of Washington* (Ford), vol. x., p. 402.

<sup>2</sup> Westcott, *Life of Fitch*, p. 126.

<sup>3</sup> *Ibid.*, p. 193.



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letter to the public written during the construction of his boat, Fitch quaintly expressed his confidence in the benefits of his invention to internal commerce, as well as the too common vicissitudes of inventors. His boat, he wrote, would be particularly advantageous on the Ohio and Mississippi, where "the God of Nature knew their banks could never be travassed by horses, and has laid in a store of fewil on their head waters sufficient to last for the latest ages, for the very purposes of navigating their waters by fire." He referred to the interest Congress had shown in Rumsey's inferior invention, and supposed himself dying in obscurity and buried on the fair banks of the Ohio, with his name inscribed on a neighboring poplar, "that future generations, when traversing the mighty waters of the West, in the manner that I have pointed out, may find my grassy turff and spread their cupboard on it, and circle round their cheerful knogging of whisky with three times three, till they should suppose a son of misfortune could never occupy the place."<sup>1</sup> The boat was completed, and plied regularly on the Delaware River in August 1787. It was observed by the members of the Convention, several of whom made trips on it, and thus had practical experience of the possibilities of the invention.

The survey thus far made of the history of the country between 1778 and 1787 has developed

<sup>1</sup> Westcott, *Life of Fitch*, pp. 190 and 191.

a remarkable succession and combination of events, all tending to enlarge the conception of indispensable powers of Congress over commerce. At first experience proved that the power of the Confederacy over foreign commerce was too limited to effect the desired relief from, or retaliation for, injuries inflicted upon our foreign trade, and a general sentiment arose in favor of vesting Congress with complete and exclusive control over foreign trade. Before the Articles of Confederation could be amended to attain this, the efforts of the several States at relief and retaliation showed that the power of the States was not adequate to accomplish the desired ends, and that the regulation of trade among the States was so connected with the regulation of trade with foreign nations, that the latter could be adequately attained only if the regulation of the former were taken from the several States and bestowed upon Congress; and a considerable sentiment developed in favor of vesting Congress with the power of regulating interstate as well as foreign commerce.

This sentiment was greatly strengthened by the irritation over the burdens imposed by some of the States upon interstate trade, and over the obstacles deliberately placed by certain States in the way of the regulation by other States of their foreign commerce. The remedy for both evils was considered to be the withdrawal from the several States of the power to regulate

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interstate commerce, and the bestowal of that power upon Congress. According to the thought of that day, the regulation of interstate trade was to be exercised, first, in aid of the regulation of foreign commerce and of the national policies with respect to various foreign nations, and was to include the power of burdening the interstate trade with restrictions and prohibitions to that end; second, to relieve the trade among the States from the burdens imposed by the States.

As public opinion was reaching this condition the great development of the West was taking place, and under circumstances which made the development of trade between that region and the Atlantic sea board of great importance to the latter; and just then inventions became known which greatly enlarged men's conceptions as to the possibilities of such trade. It is not probable—indeed it is wholly improbable—that the western situation, with its grave anxieties and great hopes, all centring about the development of trade with that region, should not have deeply influenced the thoughts of men concerning the means of controlling that trade. The power of regulating it was beyond the capacity of any State, for it led into several States, or into territory owned by the Confederacy, not by any single State. Contemporary thought was ready to admit the notion of regulating this trade through the power of Congress over interstate commerce, and the conception

of the power of regulation would naturally have expanded to include such measures as promoted the desired end. Such, if we had no documentary evidence, would be the reasonable deduction from the combined facts. But we are not left wholly without persuasive evidence to support the deduction. The report of Monroe's committee shows that the obtaining of adequate regulation of the trade between the East and the West was one of the results sought in the proposed enlargement of the commercial powers of Congress. Madison confirms Monroe's report, and Washington's correspondence shows how vital some men of the day must have deemed the fostering and regulation of that trade. It seems to me, therefore, certain that the relation of the West to the East was an important element in the development of contemporary opinion in respect to the power of Congress over interstate commerce; that its influence was inevitably to generate willingness to bestow powers upon Congress adequate to the regulation of the interstate trade of the great interior empire, which the imaginations of men were now conceiving. If this be a reasonable conclusion, then the power sought to be vested in Congress was much more than a negative power of preventing interferences by States; it was a positive power of fostering, in all appropriate ways, the trade to be regulated, and I do not doubt that the thorough-going terms in which the resolutions

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of Monroe's and Pinckney's committees are expressed result, in part, from their determination to secure to Congress an authority adequate to the regulation of the trade of such an empire.

The events thus far considered comprise those out of which issued one of the two great purposes to attain which the Constitution of the United States was framed—the adequate regulation of commerce. This purpose became merged in and dominated by the deeper one of providing a government with strong coercive powers in the interest of the security of persons and property and of civil peace. But it led to the assembly at Annapolis, which afforded the occasion of convening the Constitutional Convention. The way to Philadelphia was by Annapolis, and the assembly there in September, 1786, will be next considered.

## CHAPTER V

### THE ANNAPOLIS CONVENTION OF 1786—THE CIRCUMSTANCES WHICH PRODUCED IT—THE REPORT OF THE COMMISSIONERS

**T**HIS convention assembled at Annapolis, Md., in September, 1786, upon the suggestion of Virginia,

to take into consideration the trade of the United States; to examine the relative situation and trade of the said States; to consider how far a uniform system in their commercial regulations [might] be necessary to their common interest and permanent harmony; and to report to the several States such an act relative to [that] great object as when unanimously ratified by them [would] enable the United States in Congress effectually to provide for the same.<sup>1</sup>

The assembly resulted from measures taken by Virginia and Maryland to adjust their respective claims to the Potomac River and parts of Chesapeake Bay. The two States appointed a joint commission in 1784, to report upon the question

<sup>1</sup> Elliot, vol. i., pp. 115-116; Virginia Journals, 1785, pp. 153, 154 (Richmond Reprint of 1828).

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of jurisdiction; and, at about the same time, a memorial from their inhabitants, setting forth the depressed condition of trade, and recommending the improvement of the navigation of the Potomac River under control of both States, and the urgency of Washington with the Governor and members of the Legislature of Virginia, led to the referring to the commission of the question of improved communications with the West. The commissioners reported upon the subjects referred to them, recommending the improvement of several routes to connect the waters flowing into the Atlantic with those of the western country; and since one of these routes lay partly in Pennsylvania, they advised that permission be obtained from that State for the building within her borders of the suggested road.<sup>1</sup>

But beside the questions of jurisdiction and of improved communications with the western settlements, there were numerous matters in the policies of the two States which hindered their prosperity, such as differences in coinage and burdensome tariffs. The commissioners, therefore, going beyond their instructions, presented a supplemental report upon the general trade relations of the two States <sup>2</sup>:

It was [says McMaster] doubtless of great moment that each State should have equal and well defined

<sup>1</sup> Maryland Journals, 1784, p. 64.

<sup>2</sup> Maryland Journals for November 1785, pp. 11, 19.

rights on the waters of the river and the bay. But it was also of much importance that every hundred-weight of tobacco that went over the Potomac to Maryland, and every barrel of corn that came from Maryland to Virginia, should be made subject to a uniform system of duties. Nor was it less desirable that all disputes about the currency or the meaning of commercial laws should be settled in accordance with some uniform principles. The commissioners were well aware that however needful these things might be, it did not fall within their instructions to meddle with them. Yet they felt sure, that as good men and true, they might with perfect propriety draw up a supplementary report setting forth how, in the course of their labors, they had been deeply impressed with the want of legislation on the currency, on duties, and on commercial matters in general. This indeed they did, and added the suggestion that each year two commissioners should be appointed to report upon the details of a system for the next year.<sup>1</sup>

The report was approved in substance by the Maryland Legislature, which proposed that Pennsylvania and Delaware should be requested to join with Virginia and Maryland in carrying out its recommendations.<sup>2</sup> The Legislature also recommended that in order to maintain that equality of duties on imports and exports which was considered essential to the commerce and

<sup>1</sup> McMaster, *History of the People of the United States*, vol. i., p. 278.

<sup>2</sup> Maryland Journals, 1786, pp. 149, 150.



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revenue of both States, each should annually appoint an equal number of commissioners to consider the question of duties and also such other subjects as might concern the commercial interests of both.<sup>1</sup>

The report of the commissioners, together with the resolutions adopted by the Legislature of Maryland, were sent to the Legislature of Virginia, where they encountered some opposition, particularly in the Senate. But the opportunity presented by the consideration of the subject was seized by Madison to procure the introduction, and finally the passage, of a resolution proposing a convention of delegates of all the States to consider the condition of the trade of the country, and report such an act to Congress as would enable that body to adequately provide for its regulation; and seven commissioners, among whom were Madison and Randolph, were appointed to meet such delegates as might be named by the other States, at a time and place to be thereafter designated.<sup>2</sup>

The Virginia commissioners met, and named Annapolis, Md., as the place, and the first Monday in September, 1786, as the date of the proposed convention. But owing, in part, to the fears of some that the convention would recommend too

<sup>1</sup> Maryland Journals, November 1785, pp. 11, 19.

<sup>2</sup> Virginia Journals (Reprint of 1828), pp. 153, 154. See also Madison's account in *Writings of Madison* (Hunt), vol. ii., 396 *et seq.*

great changes in the Articles of Confederation, in part, to the fears of others that it would not go far enough, and that its action would hinder the thorough revision of the Articles which they thought necessary, only five States—New York, New Jersey, Pennsylvania, Virginia, and Delaware—were represented in the convention, which met on September 14, 1786. The assembled delegates, considering themselves too few to enter upon the main business entrusted to them, were content to draw up a report to their respective States, drafted by Hamilton and somewhat toned down upon suggestions of Randolph. It happened that New Jersey, through irritation at New York, had broadened the instructions to her delegates to include the consideration of a uniform system of commercial regulations and *other matters*, and the report took advantage of these instructions to recommend a general convention of all the States to meet at Philadelphia on the second Monday of May, 1787, “to devise such further provisions as shall appear to them necessary to render the Constitution of the Federal Government *adequate to the exigencies of the Union*, and to report such an act for that purpose to the United States in Congress assembled as, when agreed to by them and afterwards confirmed by the Legislature of every State, will effectually provide for the same.”<sup>1</sup>

<sup>1</sup> *Works of Alexander Hamilton* (Lodge), vol. i., pp. 319-323.

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The recommendation of a general convention went beyond their commissions, and the delegates sought to justify their conduct by their anxiety for the welfare of the United States, and their conviction that the power over commerce, which was intended to be vested in Congress, was so extensive as to require considerable change in the nature of the government, their report saying on this point, that

the idea of extending the powers of their deputies to other subjects than those of commerce . . . well deserved to be incorporated into that of a future convention. The commissioners are the more naturally led to this conclusion, as, in the course of their reflections on the subject, they have been induced to think that the power of regulating trade is of such comprehensive extent, and will enter so far into the general system of the Federal Government, that to give it efficacy, and to obviate questions and doubts concerning its precise limits and nature, may require a corresponding adjustment of other parts of the Federal System.

Copies of the report were sent to Congress and to the legislatures of all the States, and its recommendations were received with general favor out of Congress, so that eight States soon afterward appointed delegates to the proposed convention, and ultimately all did so excepting Rhode Island.

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The report as originally drafted by Hamilton was toned down by Randolph.

But Congress had not for some years represented the progressive tendencies of the country at large, with respect to alterations in the framework of the government,<sup>1</sup> and the proposition for a general revision of the Confederation met sufficient opposition to prevent action upon the recommendations of Hamilton's report until the general alarm over the disorders in the Eastern States, as well in as out of Congress, induced that body, on February 21, 1787, to give reluctant consent to a convention to meet at Philadelphia on the date suggested by the Annapolis commissioners, and the permission was phrased to confine the convention, if possible, to revision and alteration of the Articles of Confederation.<sup>2</sup>

But one result of the fears generated by the disorders of 1786-1787 was the selection of delegates to the convention at Philadelphia, of whom a considerable majority entertained the most progressive ideas concerning the need of a general revision of the Articles of Confederation. Their fears inclined them to favor a very different system from that of the Articles; they were in no mood to confine their work within the limits proposed by Congress, and having once assembled proceeded to formulate a new government.

<sup>1</sup> See Washington's opinion of the inferior quality of the membership of the Continental Congress, in Ford, v., 263, note.

<sup>2</sup> Elliot, i., 120. See Madison's argument that the act of Congress permitted the framing of such a Constitution as that drafted at Philadelphia in *The Federalist*, No. xxxix.

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In the view here taken, therefore, the Annapolis assembly is rather only an episode in the train of circumstances which produced the Philadelphia Convention, than a principal event in determining the substance of the Constitution. But it led to the call for the convention, and the views of the commissioners as to the scope of the commercial power of Congress must have influenced opinion at Philadelphia. It is, therefore, important to reconstruct as accurately as we can, from available data, this power of Congress as conceived of by them.

It is at once apparent that the plans of Virginia and Maryland, out of which the convention at Annapolis proceeded, provided for more specific measures of regulation than had the previous proposals. The latter had also been chiefly concerned about foreign commerce, and extended to interstate commerce mainly because the regulation of the foreign could only become effective through the control of the domestic trade. But Virginia and Maryland proposed to deal directly with commerce between several States, and to effect its regulation by the co-operation of a number of States, in matters to control which the power of one State would not suffice. They also proposed not general principles, but specific measures, and sought to secure the co-operation of at least four States in establishing a uniform system of duties on the commodities of their interstate trade. No

suggestion seems to have been made that the several States should combine in a measure to free their mutual trade from all import or export duties; but it was proposed to make the duties uniform in all the States, and to determine them, not by the arbitrary act of a single State, in its own interest, but by the conjoint action of a number of States in the interest of all. So far, therefore, as the history of the times and contemporary documents indicate the purposes of the commissioners to Annapolis, they point rather to the devising of a system of uniform restrictions upon interstate trade in the common interest, than to the formulation of a plan to set that trade free from all restrictions; and this view was expressed at the time, as by Dr. Stuart, who wrote to Washington, on December 16, 1785, that Maryland proposed to Virginia that commissioners of all the States be invited to meet and regulate the restrictions on the commerce of the whole.<sup>1</sup>

It would be pressing the above facts too far, to conclude from them that they demonstrate that the power of regulating interstate commerce, as conceived by contemporary opinion generally at this date, or by the Annapolis commissioners, expressly included the power to tax the traffic between State and State, but it is at least as unreasonable to deny that the facts indicate that the power over interstate commerce contemplated

<sup>1</sup> Bancroft, *Hist. Const.*, vol. i., p. 252.

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by the commissioners was a positive, not merely a negative, one, and included authority to restrict branches of that commerce in the interest of the Union. We probably think as the commissioners thought, when we conceive of the power over interstate commerce as taking from the several States authority to arbitrarily burden that commerce in the interest of one State, and as substituting therefor the power of imposing burdens, by the determination of all, in the interest of all. And it is evident, that this view is in harmony with all that we know, or can reasonably infer from earlier proposals for enlarging the power of Congress over commerce, for they contemplated the authority to impose restrictions and prohibitions as an important part of the power intended to be conferred upon that body.

In the proposals of Virginia and Maryland the co-operation of a number of States was also sought for the construction of highways of interstate commerce. We have seen how the development of trade routes with the West was pressing upon men's thoughts in the years from 1784 to 1787; how important such routes were considered to be, both for trade and for union; and it is at least probable that commissioners going to Annapolis from States which had shortly before proposed, or favored, mutual co-operation in the making of highways of interstate trade, as well as in the regulation of duties, coinage, and other matters

affecting commerce, should have perceived the intimate connection of the improvement of highways from State to State with the regulation and promotion of traffic between the States. The conjecture is, therefore, at least reasonable, that within the limits of the power over interstate trade designed by the commissioners to Annapolis was included authority to construct highways of that trade, at least with the consent of the several States within which the improvements lay.

Thus conceived of, the power over commerce intended by the commissioners to Annapolis to be vested in the central government was a positive power, both of controlling and of promoting interstate trade; and so interpreting their purpose, we understand their emphatic statement, that the power was of such comprehensive extent, that to give it efficacy, and obviate questions and doubts concerning its precise limits and nature, would require a readjustment of the federal system. But this statement is not accounted for, if all they intended was the investing of Congress with complete power over foreign commerce, coupled with authority to prevent the States from burdening interstate commerce. A power so limited could have been attained by alterations of the Articles of Confederation much less extensive than those contemplated by the commissioners.



## CHAPTER VI

**BREAK-UP OF THE CONFEDERATION—DISORDERS OF  
1786-1787—EFFECT OF THE ALARM PRODUCED  
BY THEM IN STRENGTHENING THE DEMAND  
FOR A STRONGER CENTRAL GOVERNMENT—  
THE POWER OF CONGRESS OVER COMMERCE  
AFFECTED BY THE GENERAL TREND OF OPINION.**

BY the beginning of 1786 the Confederation had come into a bad way. In February a Congressional committee reported that it had become the duty of Congress to declare most explicitly the arrival of a crisis, when the people of the United States must decide whether they would support their rank as a nation by maintaining the public credit at home and abroad, or whether for want of timely exertion they would hazard the existence of the Union.<sup>1</sup> In March, Grayson wrote Madison, that it was the contention of some in Congress that the Confederation was utterly inefficient, and that if it remained much longer in its state of imbecility, the United States

<sup>1</sup> Bancroft, *Hist. Const.*, i., 255; Journals of Congress, vol. ii., 29-30.

would become one of the most contemptible nations on the face of the earth.<sup>1</sup>

Conditions grew steadily worse through the year. The government of the Confederation was practically bankrupt. It was able to pay neither the interest on the foreign loans, nor its own current expenses. The proposals for a permanent revenue had come to no definite conclusion, and the requisitions upon the States had been very inadequately complied with; while, as we have seen, the proposition to invest the general government with the power of prohibiting commercial intercourse with Great Britain, and of retaliating upon nations whose commercial policy was adverse to ours, was in a state of suspended animation. Congress had fallen into disesteem. The limits placed upon its powers by the Articles of Confederation rendered it an unattractive field to men of superior talent, who found their chances of political advancement bettered by entering into various political employments within their several States, and the views held by the majority of its members no longer represented the opinions of the foremost men out of Congress. For the experience of the past five or six years had convinced the latter that a radical change in the principle of the Articles of Confederation was necessary, to adapt them to the needs of the country, and permit the necessary powers to be vested in the

<sup>1</sup> Bancroft, *Hist. Const.*, i., 491.

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general government; while the majority of the delegates in Congress seem to have adhered to the opinion, even after the meeting of the Annapolis Convention, that the Articles were defective only in such small particulars as could be remedied by enlarging certain powers of Congress without changing the character of the government. It thus came about, that Congress had but small powers, was averse to increasing them, and enjoyed no popular favor to spur it to effectively exercise such as it had. By the end of 1786, it had fallen into such decrepitude, that Washington, writing to Humphreys in December, described the Confederacy as nearly if not quite at a stand.<sup>1</sup>

In the meantime the poverty and hardship, of which there was much, at least in the country districts, notwithstanding the contrary opinion advanced by recent writers,<sup>2</sup> was producing political and economic movements, which culminated in Shays's Rebellion in Massachusetts, in the latter part of 1786 and the beginning of 1787. The efforts in many of the States to obtain the issue of paper money as full legal tender, the

<sup>1</sup> *Writings of Washington* (Ford), xi., 101.

<sup>2</sup> As in Professor McLaughlin's, "The Confederation and the Constitution," Chapter V (*The American Nation*, vol. x.). The numerous laws, however, of this period providing for stay of execution, and making chattels and real estate legal tender for debts, indicate a condition of great poverty in much of the country.

passage of laws staying execution for debt, and making a variety of chattels, and even real estate, legal tender for debts, and the levelling tendency expressed in the clamors of the time—an inclination upon the part of the dissatisfied to abolish rights of property and social distinctions—had alarmed men of wealth and station, even before actual violence broke out; and it is not strange, that when the mob at Exeter, N. H., howled at the Governor of that State demanding “equal distribution of property,” “the annihilation of debts,” “a release from taxes,” and when an armed revolt under Daniel Shays, an officer of the Revolutionary Army, threatened the existence of the State Government in Massachusetts, the end of civil order in America seemed to be near to the men whom we regard the founders of the Republic, and anarchy at hand; and in the panic of their fears they assembled at Philadelphia, and framed the Constitution, with the deliberate intention of making a central government strong enough to prevent such disorders in the future.

Contemporary documents reveal how intense their fears were. In a despatch from Mr. Temple, the British Consul General at New York, to Lord Carmarthen, in October, 1786, the former writes:

Mobs, tumults, and bodies of men in arms are now on tiptoe in various parts of this country, all tending to the dissolution of not only what is called the

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Supreme power (Congress), but to bring into contempt and disregard the legislatures and governments of the several States. . . . Indeed, dissatisfaction and uneasiness prevail more or less throughout this country; the greater part of the people poor, and many in desperate circumstances, do not, it seems, want any government at all, but had rather have all power and property reduced to a level, and it is more than probable that general confusion will take place before any permanent government will be established in this unhappy country.<sup>1</sup>

R. H. Lee wrote Washington in the same month concerning the melancholy information from Massachusetts: "We are all in dire apprehension that a beginning of anarchy with all its calamities has approached, and have no means to stop the dreadful work."<sup>2</sup> To Washington, in December, "the prospect of affairs seem like the vision of a dream"; that "there are combustibles in every State, which a spark might set fire to."<sup>3</sup>

Washington was greatly depressed, and almost despondent of relief from any quarter. But the situation showed to him as it did to others, that the only hope of escaping ruin was in a revision of the Articles of Confederation. "How ever delicate the revision of the federal system may appear," he wrote to David Stuart, on November

<sup>1</sup> Bancroft, *Hist. Const.*, ii., 399.

<sup>2</sup> *Ibid.*, ii., 402.

<sup>3</sup> Washington to Knox, Washington's *Writings* (Ford), xi., 104.

19, 1786, "it is a work of indispensable necessity. The present constitution is inadequate; the superstructure is tottering to its foundation, and without helps will bury us in its ruins"<sup>1</sup>; and on the same day he wrote to Randolph: "Our affairs seem to be drawing to an awful crisis; it is necessary, therefore, that the abilities of every man should be drawn into action in a public line, to rescue them, if possible, from impending ruin,"<sup>2</sup> and the shortest course for conveying to the central government the powers it was wanting of seemed to him best; for "otherwise, like a house on fire, whilst the most regular mode of extinguishing the flames is contended for, the building is reduced to ashes."<sup>3</sup> To Madison, the difficulties which presented themselves in connection with the impending convention seemed almost sufficient to dismay the most sanguine, whilst the mortal diseases of the existing constitution impelled the most timid to encounter them<sup>4</sup>; and even the moderate Randolph urged the convention, in June, 1787, not to be scrupulous as to the powers to be surrendered to Congress; for "when the salvation of the Republic was at stake, it would be treason to our trust not to propose what we found necessary."<sup>5</sup>

<sup>1</sup> Bancroft, *Hist. Const.*, ii., 404.

<sup>2</sup> *Ibid.*

<sup>3</sup> Washington to Knox, in Washington's *Writings* (Ford), xi., 110.

<sup>4</sup> *Writings of Madison* (Hunt), ii., 326.

<sup>5</sup> *Documentary History of Constitution*, iii., 136.

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It is plain to us, with our advantage of historical perspective, by which we see occurrences of one hundred and twenty years ago in truer relation than that in which they could be observed by the men who participated in them, that the fears of 1786 and 1787 were out of all proportion to their cause. The ease with which Shays's Rebellion was suppressed by the determined measures of Governor Bowdoin, and the small effect which the principles of its adherents had on the subsequent history of the United States, show to us that it could hardly have been a very dangerous uprising; and that there was but slight cause for the apprehension entertained at the time, that it foreshadowed the breakdown of civil government in America, and the coming in of anarchy and class hatred. (But the Constitution of 1787 was framed, not in the light of the knowledge of 1910, but under the influence of the hopes and fears of 1787; and it is certain that the alarms of that year had great influence in determining the powers granted to the United States.) In its guarantee of a republican form of government to every State, the Constitution has a patent reminder of the perils of 1786 and 1787. But the principle of the whole instrument, in its contrast to that of the Articles of Confederation, testifies as certainly, if less conspicuously, to its origin. In 1792, Edmund Randolph, then Attorney-General of the United States, in his argument in the case of Chisholm

vs. Georgia (2 Dallas, 419), contrasting the Articles of Confederation and the Constitution, spoke of the former as "of so different a hue and feature from the Constitution, as scarcely to appear a child of the same family"; and the Constitution is a child of a different family from the Articles of Confederation, because it results, not from the Annapolis Convention, but from the alarm of the political, social, and financial aristocracy over the disorders of that time. For, in consequence of the alarms of 1786-1787 the Constitutional Convention became a body in which a predominant majority represented the well-to-do and socially superior classes; not only patriotic desire to serve the country, but strong personal interest sent representatives of these classes to Philadelphia. Washington had written in November, 1786, that it was necessary in the awful crisis of affairs, that the "abilities of every man should be drawn into action to rescue them, if possible, from impending ruin"<sup>1</sup>; and Randolph had sought to overcome the reluctance of Washington to taking part in the convention, by suggesting that every other consideration seemed of little weight when compared with the crisis which might hang over the United States by the time the convention assembled. Similar sentiments affected other leading men of the day and sent them to the convention, so that a recent special study of the

<sup>1</sup> Bancroft, *Hist. Const.*, ii., 404.



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constitutional era states that it is quite safe to affirm that the men who put their names to the new constitution were, at the time, identified with the aristocratic interest.<sup>1</sup> It was inevitable that such men, assembling under such circumstances, should frame a central government of greatly increased powers, at the expense of the powers of the States. For they traced the dangers which they feared to the weakness of Congress, and to the obstacles which the States had interposed to the efforts of that body to give the country a more efficient administration. In their view, the disorders of 1786-1787 were the culmination, the inevitable result, of the weak and conflicting methods of government which had prevailed under the Articles of Confederation. The aim of the majority of the convention was not, therefore, to bestow upon the general government only the least increase of powers, which would correct the defects of the Confederation in certain particulars, such as the regulation of commerce, but to vest it with all powers necessary for effective national administration, and to insure the country against the recurrence of such perils as had threatened them. In their view, the powers to be reserved to the States were secondary; the primary object was the making of a strong effective central government. If that could not be effected

<sup>1</sup> *The Federal Constitution in Massachusetts*, by Samuel Banister Harding (Harvard Historical Studies, 1896), p. 75.

without the subordination of the States in great degree, then the States were to be subordinated; if it could be effected without such subordination of the States, then the States were to retain a considerable degree of power under the new system. At no time did the majority of the convention intend to vest the general government with unlimited powers. Always, I think, they intended to vest it only with delegated powers. But these were to be adequate to the needs of a strong national administration, and to the States were to be reserved only what was left after this great body of powers had been transferred to the central government.

If we had no contemporary documents, the course of events preceding the meeting of the convention, and the character of the membership of that body, would assure us of this. But we are not left to such reasonable inference only. We have sufficient contemporary evidence to prove such intention. In August, 1786, Washington was of the opinion that we could not exist long as a nation without having lodged somewhere a power, which would pervade the whole United States in as energetic a manner as the authority of the State governments extended over the several States.<sup>1</sup> Madison wrote, early in 1787, suggesting a middle ground, which might at once support the supremacy of the national authority,

<sup>1</sup> *Writings of Washington* (Ford), vol. xi., 53, 54.

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and not exclude the local authorities *wherever they could be subordinatedly useful*; and he proposed that, "in addition to the present federal powers, the national government should be armed with positive and complete authority in all cases which require uniformity, such as the regulation of trade, including the right of taxing both exports and imports, the fixing the terms and forms of naturalization." Over and above this positive power, a negative in all cases whatsoever on the legislative acts of the States, as heretofore exercised by the kingly prerogative, appeared to him absolutely necessary, and to be the least possible encroachment on the State jurisdiction. Without this defensive power he contended that every positive power which would be given on paper would be evaded, though a right to coerce the States should be expressly declared.<sup>1</sup> Later, in the convention, he expressed the opinion, that the States ought to be placed under the control of the general government, at least as much so as they formerly were under the King and British Parliament.<sup>2</sup> Knox considered that all national objects should be designated and executed by the general government, without any reference to the local government. This, he thought, was a government of

<sup>1</sup> *North American Review* for October, 1827. See also Madison to Randolph, April 8, 1787, in Gilpin, ii., 631 *et seq.*, and Hunt's *Writings of Madison*, ii., 345 *et seq.*

<sup>2</sup> Yates's Minutes, in Elliot's *Debates* (edition of 1866), vol. i., 462.

"the least possible powers, to preserve the confederated government. To attempt less will be to hazard the existence of republicanism, and to subject us either to a division of the European powers or to despotism arising from high handed commotions."<sup>1</sup> Jay thought that the more power there was granted to the general government the better, the States retaining only so much as might be necessary for domestic purposes, and all their principal officers, civil and military, being commissioned and removable by the national government.<sup>2</sup>

That the quoted opinions of Washington, Madison, Knox, and Jay fairly represent the general trend of thought among the members who dominated the Constitutional Convention, upon the relation of the powers of the Central Government to those of the States, is made evident by two letters of this period, one from Edward Carrington to Thomas Jefferson, the other from George Mason to his son. Carrington's letter is especially significant for its indication of a great change in public opinion upon the need of greater powers in the central government, since 1784, when Jefferson went abroad. He writes:

The prevailing impression, as well in as out of convention, is that a Federal Government, adapted to the permanent circumstances of the country, without

<sup>1</sup> *North American Review* for October, 1827.

<sup>2</sup> *Correspondence and Public Papers of John Jay* (Johnston's edition), vol. iii., 228.

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respect to the habits of the day, will be formed, whose efficiency shall pervade the whole empire; it may, and probably will at first, be viewed with hesitation; but, derived and patronized as it will be, its influence must extend into a general adoption as the present fabric gives way. . . . I am certain that nothing less than what will give the Federal Sovereignty a complete control over the State governments will be thought worthy of discussion.

The ideas here suggested are far removed from those which prevailed when you was among us; and as they have arisen with the most able from an actual view of events, it is probable you may not be prepared to expect them; they are, however, the most moderate of any which obtain in any general form among reflective and intelligent men.<sup>1</sup>

According to Mason,

the most prevalent idea in the principal states [seemed] to be a total alteration of the present federal system, and substituting a great national council or parliament consisting of two branches of the legislature, founded upon the principles of equal proportional representation, with full legislative powers upon all the objects of the Union, and an executive; and to make the several State legislatures subordinate to the national, by giving the latter the power of a negative upon all such laws as they "the national parliament" shall judge contrary to the interest of the Federal Union.<sup>2</sup>

<sup>1</sup> Bancroft, *Hist. Const.*, ii., 426 *et seq.*

<sup>2</sup> *Life of George Mason*, by Kate Mason Rowland (1892), vol. ii., 101.

In a subsequent letter, dated June 1, 1787, Mason notes that the same principles are still prevalent, and expresses his confidence that the character and abilities of the members of the convention will prevent too great a departure from republican principles.<sup>1</sup>

A strong government is one strong in fact, in the possession of great powers in respect to the various subjects of legislation; and it was inevitable that the nationalistic tendency which dominated the majority of the Constitutional Convention should draw into its current all particular powers deemed necessary to be vested in the general government. The conjecture is unreasonable, that men who entertained the opinions set forth in Carrington's and Mason's letters should not have contemplated vesting the general government with great powers over each subject which they determined to entrust to it. They had no conception of a government abstractly strong, but concretely weak; and this remark applies particularly to the power to regulate commerce; for the deficiency of the Confederation, in this respect, had for years aroused protests from many regions of the country. Since 1781, at least, in and out of Congress, proposals had been made to correct this defect in one respect or another, and the call for the convention proceeded from an effort to improve the regulation of trade. It seems to me, therefore, impossible

<sup>1</sup> *Ibid.*, 129, 130.

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that the nationalists, who were the majority of the convention, contemplated the restriction of this power, through any consideration for the autonomy of the States. To suppose that they did, is to assume a state of mind in them as to the one subject, upon which all were agreed the powers of the general government must be increased, contrary to their general aims, as indicated in the records of the time.

The opposite view belongs to a much later date than the year of the convention,—to a time when the emotions and intentions of the constitutional period had been forgotten, or were misrepresented for party purposes. The more reasonable opinion, based upon the contemporary documents, is that the convention intended to vest the general government with that fulness of power over commerce, both foreign and interstate, which is indicated by the broad terms of the clause of the Constitution bestowing it upon Congress; that the men of the convention were at one with the expressed purpose of the reports of Monroe's committee of 1785, and Pinckney's of 1786, in desiring to vest in the general government the sole and exclusive right and power of regulating commerce, as well with foreign nations, as among the several States, except in the few particulars reserved from such general power by the Constitution. We shall find in the debates in the Constitutional Convention, and in the State conventions which

ratified the Constitution, evidence of the great scope assigned to the commercial power of Congress by the opinion of that day; and we have a suggestion by Madison before the convention met, of such a power surpassing the extremest range attributed to it in any recent proposal. In 1781 he had already arrived at the principal of using the power of the Confederacy over commerce to coerce a State. In that year, as appears from a letter to Jefferson, a committee of the Continental Congress, of which Madison was a member, reported an amendment to the Articles of Confederation, to enable the Confederacy to compel a State to fulfil its obligations. Among other modes of coercion, the amendment provided particularly for making distraint on any of the effects, vessels, or merchandise of such States, or of any of the citizens thereof, and for prohibiting and preventing their trade and intercourse, as well with any other of the United States and the citizens thereof, as with any foreign states, and as well by land as by sea. As an easy way of enforcing this prohibition, Madison suggests that

two or three vessels of force employed against their trade, will make it the interest of most of the States to yield prompt obedience, and with respect to States which have little or no foreign trade, it was provided that all inland trade with such States as supply them with foreign merchandise might be interdicted, and



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the concurrence of the latter might be enforced, in case of refusal, by operation on their foreign trade.<sup>1</sup>

In 1787, the power which he intended to bestow upon the general government over commerce was of such extent, that, as he explains its operation:

With the resources of commerce in hand, the national administration might always find means for exerting it [the power of coercion] either by sea or land; but the difficulty and awkwardness of operating by force on the collective will of the State, render it particularly desirable that the necessity of it might be precluded. Perhaps the negative on the laws might create such a mutuality of dependence between the general and particular authorities as to answer this purpose, or perhaps some defined objects of taxation might be submitted along with commerce to the general authority.<sup>2</sup>

It is clear from this last extract, that the resources over commerce which Madison proposed in 1787 to vest in Congress must have included a complete and positive power of regulation; for nothing short of that could effect the coercion of a State, through prohibitions upon its commerce by land and sea. If a member of Congress should now propose to coerce such a State as New Jersey, into corporate legislation conformable to the Congressman's ideas of dangerous monopolies in interstate

<sup>1</sup> *Writings of Madison* (Hunt), vol. i., 131, 132.

<sup>2</sup> *Ibid.*, vol. ii., 348.

trade, by prohibitions upon the foreign and interstate commerce of the citizens of that State, extraordinary as such a project would seem to us, it would not be materially different from Madison's views of the extent of the powers which should be possessed by the general government.

Madison's extraordinary proposal was, of course, not made to nor accepted by the convention; but it is one among many indications that the vesting of the general government with a great commercial power was intended by the leaders of opinion, while the Constitution was in process of forming; and we know that the convention was dominated by those who were strongly inclined to nationalist, as distinguished from State rights sentiments.

## CHAPTER VII

### THE CONSTITUTIONAL CONVENTION—THE RELATION OF THE POWER OF CONGRESS OVER COMMERCE TO THE PROCEEDINGS OF THE CONVENTION AS A WHOLE—THE PREDOMINANT NATIONALIST SENTIMENT OF THE CONVENTION AND THE GREAT SCOPE OF THE COMMERCIAL POWER AS UNDERSTOOD BY ITS MEMBERS

THE interpretation which the majority of the Constitutional Convention probably gave to the commerce clause can be understood only in connection with the character of the membership of the convention, and its work as a whole.

In the Massachusetts Convention of 1788, the Rev. Thomas Thatcher explained the reasons which induced the framers of the Constitution to vest the general government with the great powers then objected to and ever since ardently discussed; and his statement is perhaps as accurate as has ever been made. He was considering the objections that more power than was necessary had been granted to the Union, that the Constitution would tend to destroy the local governments of the States, and that the end would be aristocracy

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or despotism. He thought it necessary to take into view the situation of the continent when the Constitution was formed, and to candidly examine the condition of the States from New Hampshire to Georgia, and see how far vigor and energy in the central government were required.

During the session of the late convention [he said], Massachusetts was on the point of Civil War. In Vermont and New Hampshire, a great disaffection to their several governments prevailed among the people. New York absolutely refused complying with the requisitions of Congress. In Virginia, armed men endeavored to stop the courts of justice. In South Carolina, creditors by law, were obliged to receive barren and useless land for contracts made in silver and gold. I pass over the instance of Rhode Island: their conduct was notorious. In some States, laws were made directly against the Treaty of Peace; in others, statutes were enacted which clashed directly against any federal union—new lands sufficient to discharge a great part of the Continental debt—intruded upon by needy adventurers—our frontier settlements exposed to the ravages of the Indians—while the several States were unable or unwilling to relieve their distress. Lay all those circumstances together, and you will find some apology for the gentlemen who framed this Constitution. I trust you may charitably assign other motives for their conduct than a design to enslave their country, and to parcel out for themselves its honors and emoluments.\*

\* *Elliot's Debates*, vol. ii., 144.

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and not exclude the local authorities *wherever they could be subordinately useful*; and he proposed that, "in addition to the present federal powers, the national government should be armed with positive and complete authority in all cases which require uniformity, such as the regulation of trade, including the right of taxing both exports and imports, the fixing the terms and forms of naturalization." Over and above this positive power, a negative in all cases whatsoever on the legislative acts of the States, as heretofore exercised by the kingly prerogative, appeared to him absolutely necessary, and to be the least possible encroachment on the State jurisdiction. Without this defensive power he contended that every positive power which would be given on paper would be evaded, though a right to coerce the States should be expressly declared.<sup>1</sup> Later, in the convention, he expressed the opinion, that the States ought to be placed under the control of the general government, at least as much so as they formerly were under the King and British Parliament.<sup>2</sup> Knox considered that all national objects should be designated and executed by the general government, without any reference to the local government. This, he thought, was a government of

<sup>1</sup> *North American Review* for October, 1827. See also Madison to Randolph, April 8, 1787, in Gilpin, ii., 631 *et seq.*, and Hunt's *Writings of Madison*, ii., 345 *et seq.*

<sup>2</sup> Yates's Minutes, in Elliot's *Debates* (edition of 1866), vol. i., 462.

"the least possible powers, to preserve the confederated government. To attempt less will be to hazard the existence of republicanism, and to subject us either to a division of the European powers or to despotism arising from high handed commotions."<sup>1</sup> Jay thought that the more power there was granted to the general government the better, the States retaining only so much as might be necessary for domestic purposes, and all their principal officers, civil and military, being commissioned and removable by the national government.<sup>2</sup>

That the quoted opinions of Washington, Madison, Knox, and Jay fairly represent the general trend of thought among the members who dominated the Constitutional Convention, upon the relation of the powers of the Central Government to those of the States, is made evident by two letters of this period, one from Edward Carrington to Thomas Jefferson, the other from George Mason to his son. Carrington's letter is especially significant for its indication of a great change in public opinion upon the need of greater powers in the central government, since 1784, when Jefferson went abroad. He writes:

The prevailing impression, as well in as out of convention, is that a Federal Government, adapted to the permanent circumstances of the country, without

<sup>1</sup> *North American Review* for October, 1827.

<sup>2</sup> *Correspondence and Public Papers of John Jay* (Johnston's edition), vol. iii., 228.

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## 90 Commercial Power of Congress

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by the advocates of State rights. But Paterson favored the throwing of the territory of all the States into one common mass, and its division into thirteen or more new States.\*

There is a certain consistency in great public movements. It is not usually possible for a body of men engaged in a fundamental change of government to be devoted to particular purposes; and yet to be equally effective in advocacy of contradictory aims. It was, therefore, inevitable that the opposition of the State rights party to the erection of a strong central government should be weakened, even below their inferiority in numbers, by the fears, political philosophies, and cherished purposes of various members or groups within that party.

The motives and fears which sent the majority of the convention to Philadelphia led them to favor the erection of a central authority independent of the States, and vested with great powers. And it is an important observation, too generally overlooked in later constitutional studies, that there was not in the convention, until near its end,

\* Papers of William Paterson on the Federal Convention, 1787, reprinted from the *American Historical Review*, vol. ix., No. 2 (January, 1904). Paterson's notes were apparently used in preparing the New Jersey Plan. In the resolution referring to the western territories, Paterson proposed, "that all the lands contained within the limits of the individual States, and of the United States, should be considered as constituting one body or mass, and divided into thirteen or more integral States."

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if indeed there ever was, any considerable opposition to the grant of great specific powers to that authority. The struggle between the two parties in the convention was not over the question of the extent of such powers, but over the more fundamental question of the organization and control of the new government. For at the date of the assembling, and until shortly before the close of the convention, if not quite to its end, all parties were agreed that great powers must be vested in the central government, but there was much difference of opinion upon the question whether that government should be made independent, or continued under the control, of the States in their corporate capacities. The views of those who favored the rights of the States are probably correctly summarized in the letter of an unknown author written to Washington from Cambridge, in Maryland, in June, 1787.<sup>1</sup> He would retain to the States their control over Congress. But the powers of that body were

to be made as ample as the federal interest should require; and when ascertained, should be as supreme, as absolute, and obligatory upon *all continental concerns* as the power of legislation in each republic. Congress should consequently be authorized to enact laws, statutes, or ordinances in all cases comprised within their jurisdiction, whether relating to war, peace,

<sup>1</sup> *Documentary History*, vol. iv., 229, 231.

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commerce, navigation, armies, navies, piracies, treaties, alliances, public debts, coinage, etc. etc. etc.

Had the majority of the convention been content merely to amend the Articles of Confederation, or even to construct a new government upon their principle of control by the States as such, very little opposition would probably have been made to the vesting in the central authority of specific powers even greater than those conferred upon it by the Constitution. The full extent of the powers of the central government when freed from state control was probably not perceived by the members of the convention; and the victory for an independent central authority having been won, over to it was carried the totality of powers which could have been vested in that authority without opposition, had the State rights plan of its organization and control prevailed. After the convention adjourned, and its work became known to the country, the possibilities of such powers possessed by a government, of the kind outlined in the Constitution, began to be perceived, and excited much opposition in the ratifying conventions; which, however, failed to prevent the ratification of the Constitution, and the new government went into operation with the totality of powers bestowed upon it by the convention.

The majority of the convention were not certain

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that their opinions were those of the country at large, and feared they were not; but they were determined to frame a Constitution, rather as they thought it should be, than as they conjectured the country might desire it to be. For they believed the experiment they were bent upon making would be useful in the future, even though it failed of adoption in the present.

My wish [wrote Washington to Madison, in March, 1787] is that the convention may adopt no temporizing expedients, but probe to the bottom and provide a radical cure, whether agreed to or not. A conduct of this kind will stamp wisdom and dignity on their proceedings, and hold up a light which sooner or later will have its influence<sup>1</sup>; and a few days later, Madison expressed the opinion to Randolph, that "in framing a system, no material sacrifices ought to be made to local or temporary prejudices."<sup>2</sup>

And it is proved by the summary of the prevalent sentiment among the delegates by Carrington and Mason, in the letters I have already quoted, that a total alteration of the federal system had been determined upon, to result in the erection of a new government, which would be adapted, in Carrington's phrase, to the permanent circumstances of the country, without regard to the habits of the day, with complete control over the

<sup>1</sup> Sparks, *Washington*, ix., 250.

<sup>2</sup> *Writings of Madison* (Hunt), ii., pp. 337-340.

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State governments, and in which, according to Mason, the several State legislatures, would be made subordinate to the national legislature by giving to the latter the power of negative upon all such laws of the former as the Congress should judge contrary to the interests of the Federal Union.

That, selected as they were, the opinions of the majority of the delegates did not fairly represent the wishes of the country at large, is possible; that they did not express the prevalent sentiment in some of the States seems to be certain. Whether they did or did not fairly represent the opinions of the majority of the men who then possessed the suffrage throughout the thirteen States, is as yet uncertain, and will probably never be ascertained. But for the purpose of an inquiry into the origin of certain clauses of the Constitution, and the meaning assigned to them by contemporary opinion, it is not important whether the views of the majority of the convention were those of the country at large or not. For the Constitution was formulated, not by the country at large, but by the convention, and in secret; the words in which it was expressed were settled in the convention; and the first step in that inquiry is to ascertain what the origin and the environment of the convention and its proceedings indicate these clauses signified to the men who framed them. { And the important starting points of the investi-

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gation are, that the convention was largely composed of representatives of the higher classes of society, who settled the provisions of the Constitution under the influence of fears inducing them to frame a powerful central government; and that the attainment of their purpose was facilitated by divisions among their opponents, and by a general opinion that it was necessary to vest great specific powers in the Union.

The predominance of nationalist sentiment in the convention might reasonably be inferred from the facts before cited; it is proved by the adoption of the plan of drafting a new constitution, rather than of merely amending the Articles of Confederation; and by the insertion of the "necessary and proper" clause at the end of the eighth section of the first article of the Constitution.

The advocates of State rights throughout the country, and particularly in Congress, had sought to restrict the work of the convention to revision and amendment of the Articles of Confederation. The resolution of the Continental Congress approving of the assembling of the convention had been expressly phrased to that end<sup>1</sup>; and the opponents of the Constitution made the departure of the convention from this restricted plan the basis of strong opposition to ratification. But the experience of the country, as interpreted by the nationalists, showed the need of more fundamental

<sup>1</sup> *Doc. Hist. Const.*, i., p. 8; *Elliot's Debates*, i., 120.



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change than revision of the Articles of Confederation. In their view, the situation required the inauguration of a government upon a new principle; and under the advocacy of Madison Randolph's Virginia plan, which became the basis of the work of the convention, was formulated and presented to that body.<sup>1</sup> As amended, the plan provided for a national government consisting of a supreme legislative, judiciary, and executive.<sup>2</sup> It was at once perceived that this plan involved more than amendment of the Articles of Confederation—the framing, indeed, of a new kind of government—and much opposition was expressed to it upon that ground. During the debate, Mr. William Paterson, of New Jersey, representing the State rights opposition to the Virginia plan, presented to the convention the alternative New Jersey plan, which was framed

<sup>1</sup> In a letter to Noah Webster, of Oct. 12, 1804, Madison gives the following account of the origin of the Virginia plan: "When the convention," he writes, "took place at Philadelphia, the deputies from Virginia supposed that some introductory propositions might be expected from them. They accordingly entered into consultation on the subject immediately upon their arrival in Philadelphia, and having agreed on the outline of a plan, it was laid before the convention by Mr. Randolph at that time Governor of the State, as well as member of the convention. This project was the basis of its deliberations; and after passing through a variety of changes in its important as well as its lesser features, was developed and amended into the form finally agreed to." (Hunt, *Writings of Madison*, vii., p. 166.)

<sup>2</sup> Elliot's *Debates*, vol. i., 181, (Ed. 1866); *Doc. Hist.*, iii., p. 23.

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to restrict the convention to amendment of the Articles of Confederation. The two parties joined issue on the adoption of the one or the other of these plans, and the supremacy of the national sentiment was shown by the vote, in the Committee of the Whole, upon June 19th, to postpone the consideration of the first resolution of the New Jersey plan, which provided only for the revision, correction, and enlargement of the Articles of Confederation.<sup>1</sup> Immediately after this vote, the committee, by seven States to three, reported the Virginia plan in preference to the New Jersey plan.<sup>2</sup>

The adoption of the Virginia plan also indicated the supremacy of the nationalist sentiment upon the fundamental question, Whether the States, as such, should or should not control the new central government. The Articles of Confederation had insured the dominance of the States over the national legislature, by providing that votes in the Congress should be taken by States, each State having one vote; and that, for the passage of all important measures, the assent of nine States should be necessary. That government was, therefore, a Confederacy of essentially sovereign States, and was controlled by them in their corporate capacity. The Virginia plan, by omitting all provisions for voting by States, and by con-

<sup>1</sup> *Doc. Hist. Const.*, iii., 125, 151.

<sup>2</sup> *Ibid.*, 162; Elliot's *Debates*, i., 180.

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templating the taking of votes by individual members of Congress, at once freed the national legislature from State control, and erected it as an independent organ of government. The significance of this departure from the Articles of Confederation was clearly perceived in the convention, was strenuously opposed by those who favored the rights of the States, and the old system was sought to be perpetuated in the New Jersey plan. The defeat of that plan, therefore, on June 19th, also involved the defeat of the State rights party upon this fundamental question, and the supremacy of the nationalist party was emphasized by the vote in the convention, on June 21st, of nine States to two, in favor of the election of the first branch of the national legislature (House of Representatives), by the people. When the question of the suffrage of the several States in the second branch, or Senate, arose, the smaller States forced the concession of an equal representation of all the States in that body<sup>1</sup>; but there also votes were to be taken by individual members, and bills carried or lost by majorities of members voting, not of the States. After the compromise upon the representation in the Senate, on July 7th and 16th,<sup>2</sup> sufficient additional support was given by delegates from the smaller States to the nationalists, to insure their predominance in the

<sup>1</sup> *Doc. Hist. Const.*, iii., p. 343; Elliot, v., p. 316.

<sup>2</sup> *Ibid.*, iii., pp. 291, 343.

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convention during the remainder of its sessions. "From the day," writes Bancroft, "when every doubt of the right of the smaller States to an equal vote in the Senate was quieted, they—so I received it from the lips of Madison, and so it appears from the records—exceeded all others in zeal for granting powers to the general government. Ellsworth became one of its strongest pillars, Paterson, of New Jersey, was for the rest of his life a Federalist of Federalists."<sup>1</sup>

The supremacy of the nationalist sentiment in the convention as late as August 20th is further proved by the adoption on that day, without dissent, of the "necessary and proper clause," as reported from the Committee of Detail:<sup>2</sup> "To make all laws necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof" (Constitution, Art. I., Sec. 8, last paragraph).

This clause is that out of which the great judicial development of the powers of the general government, and of the commercial power of Congress in particular, has proceeded. Its importance was perceived by the members of the convention, and that it was adopted as late as August 20th, without dissent, demonstrates the

<sup>1</sup> Bancroft, *Hist. Const.*, vol. ii., p. 88.

<sup>2</sup> *Doc. Hist. Const.*, iii., p. 568.

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control which men of nationalist sentiment had at that time over the convention.

The clause gives a concise expression of the purpose of the majority of the convention to render the enumerated powers of Congress adequate to the promotion of the general welfare of the nation, in matters to which the exercise of any of the enumerated powers is appropriate, and to which the powers of the respective States are inadequate. There is, I think, no justification in the history of the convention for the opinion that its members intended to bestow upon Congress the power to legislate generally for the welfare of the Union; but the history of the times, and its proceedings, show that they did intend to so enlarge the enumerated powers, that each should include all measures properly within its particular field, and adapted to promote the general welfare of the country by legislation in that field.

The report of the commissioners to the Annapolis Convention of 1786 had recommended the calling of a convention of all the States, "to take into consideration the situation of the United States, to devise such further provisions as should appear to them necessary to render the Constitution of the United States adequate to the exigencies of the Union, and to report such an act as would effectually provide for the same." The reluctant consent of Congress to the calling of the Philadelphia Convention had contemplated that

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the alterations proposed in the convention should be such as should "render the Federal Constitution adequate to the exigencies of the government and the preservation of the Union." The first article of the Virginia plan proposed that "The Articles of Confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution; namely, common defence, security of liberty, and general welfare." The sixth resolution of this plan, as amended in the Committee of the Whole, and reported to the convention on June 13th and 19th, recited:

That the national legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation; and, moreover, to legislate in all cases to which the separate States are incompetent; or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several states contravening, in the opinion of the national legislature, the articles of Union, or any treaty subsisting under authority of the Union.<sup>1</sup>

On July 17th, the convention adopted Luther Martin's proposal that all legislative acts and treaties made by virtue of the articles of Union be the supreme law of the land<sup>2</sup>; and perceiving that this provision rendered a negative upon State

<sup>1</sup> *Doc. Hist. Const.*, iii., pp. 121, 151.

<sup>2</sup> *Ibid.*, iii., p. 353; Elliot, v., p. 322.

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laws unnecessary, on the same day, struck out the clause relating to the negative on the State laws. Upon this day, also, Roger Sherman proposed to insert in place of "individual legislation," in the resolution, as reported, the words, "to make laws binding on the people of the United States in all cases which may concern the common interest of the Union; but not to interfere with the government of the individual States in any matters of internal police, which respect the government of such States only, and wherein the general welfare of the United States, is not concerned."<sup>1</sup>

But the convention was in no mood for even so moderate a restriction of the powers of the national legislature as Sherman proposed, and his motion was rejected by a vote of eight States to two.<sup>2</sup> Immediately afterwards, upon motion of Mr. Bedford, and by a vote of six States to four, the powers of Congress were enlarged to include the capacity of legislating in all cases for the general interests of the Union, in addition to the powers conferred by the resolution as reported from the Committee of the Whole.<sup>3</sup> As sent to the Committee of Detail, therefore, this resolution was in the following form:

6. Resolved, That the national legislature ought

<sup>1</sup> Elliot's *Debates*, v., pp. 319, 320; *Doc. Hist. Const.*, iii., pp. 349, 350.

<sup>2</sup> *Ibid.*, p. 350; Elliot, v., p. 320.

<sup>3</sup> *Ibid.*, iii., p. 351; Elliot, v., p. 320.

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to possess the legislative rights vested in Congress by the Confederation; and, moreover, to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.<sup>1</sup>

The experience of the country under the Confederation had led the men who afterwards controlled the Constitutional Convention to the conclusion, that the Articles must be so modified as to vest in the central government powers throughout the nation, and with respect to national objects, co-extensive with those which the State possessed over local objects, within their respective limits. Washington had formulated this principle in a letter to Jay, of August 1, 1786, previously quoted, as follows:

"I do not conceive we can exist long as a nation, without having lodged somewhere a power which will pervade the whole Union in as energetic a manner as the authority of the State governments extends over the several States."<sup>2</sup>

Before the assembling of the convention, and during its deliberations, the men who procured the framing of the Constitution worked toward the

<sup>1</sup> Meigs, *Growth of Constitution in Federal Convention of 1787*, p. 334 (Phila., 1900).

<sup>2</sup> Ford's *Writings of Geo. Washington*, vol. xi., pp. 53, 54.



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accomplishment of the end proposed by Washington, and all parties seem to have favored the vesting in the central government of powers adequate to the exigencies of the Union. The report of the Annapolis commissioners, the Congressional call for the meeting of the Constitutional Convention, the Virginia and the New Jersey plans, the proposals of Roger Sherman, and the Connecticut plan, and, finally, Bedford's amendment to the sixth resolution of the Virginia plan—all contemplated that the central authority should have powers adequate to the needs of the body politic. The resolution became the source out of which the Committee of Detail drew its enumeration of the specific powers of Congress, and the "necessary and proper" clause enlarging those powers. Such a history shows that the convention intended to enlarge each enumerated power up to such scope as would enable Congress to legislate upon all subjects within the range of that power, which promoted the welfare of the country in respect to such subjects, and were beyond the powers of the individual States. With respect, for example, to the power of Congress over commerce, this history shows that the convention intended to vest Congress with power over the several divisions of commerce, to which the clause relates, adequate to the passage of all measures properly falling under any of those divisions,

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and appropriate to promoting the general welfare of the country.<sup>2</sup>

<sup>2</sup> In his "Political Observations," written in 1795, when he was a strict constructionist, Madison stated this principle as follows:

"From this convention proceeded the present Federal Constitution, which gives to the general will the means of providing in the several necessary cases for the general welfare, and particularly in the case of regulating our commerce in such manner as may be required by the regulations of other countries." *Works of Madison*, vol. iv., 487. (Ed. 1865.)

## CHAPTER VIII

### THE COMMERCE CLAUSE IN THE CONVENTION— THE SCOPE ASSIGNED TO THE COMMERCIAL POWER OF CONGRESS

THE sixth resolution of the Virginia plan, broadened by Bedford, was referred to the Committee of Detail, consisting of Randolph, Rutledge, Gorham, Ellsworth, and Wilson. On August 6, 1787, this committee reported to the convention a draft of a constitution embodying the principles of the several resolutions which had been referred to them, and vesting Congress with the power:

"To regulate commerce with foreign nations, and among the several States."<sup>1</sup>

The terms of this clause make no distinction between the scope of the power to regulate commerce with foreign nations and among the several States. The convention included among its members the ablest lawyers of the day in America; it contained men who were peculiarly capable in the use of language to express legal concepts—men whom the events of the preceding eight or

<sup>1</sup> *Doc. Hist. of the Const.*, iii., p. 449; Elliot, v., p. 378.

nine years had compelled to much reflection upon the relation of the regulation of commerce in all its branches to the powers of the States and the central government. The commercial proposals in Congress, the measures of various State legislatures, municipal and other public bodies, from 1778 to 1787, indicate that the committee understood very well what they wished to accomplish. The conjecture, that, although they expressed the power of Congress over foreign and over interstate commerce in similar terms, yet they really intended to vest that body with a complete and positive power over foreign, but with only a limited and chiefly negative power over interstate trade, is without warrant in the history of those times, or in the terms of the committee's report, which indicate rather an intention to vest Congress with power over interstate commerce, not more, but less restricted than that over foreign commerce; for the report prohibited the laying of a tax or duty on articles exported from any State, the enactment of laws preventing the migration or importation of such persons as the several States should think proper to admit, and the imposition of taxes or duties on such persons. It also provided that no navigation act should be passed without the assent of two thirds of the members present in each house.<sup>1</sup> But all of these restrictions related exclusively

<sup>1</sup> *Doc. Hist. Const.* iii., p. 450; *Elliot*, v., p. 379.

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to foreign commerce, while the power to regulate trade among the States was left unrestricted.

The progress of the commerce clause in the Committee of Detail also supports the inference that they intended to vest Congress with a power over interstate at least equal to that over foreign commerce. For, besides the resolutions referred to them by the convention, the committee had before it the New Jersey plan, Charles Pinckney's plan, and the draft of a constitution prepared by Randolph. The New Jersey plan vested Congress with power "to pass acts for the regulation of trade and commerce, as well with foreign nations as with each other," but provided that no act for the purpose should be passed without the consent of a prescribed number of States.<sup>1</sup> This plan represented the views of State rights advocates in the convention, but its terms indicate an intention to vest Congress with similar power over both foreign and interstate commerce. Pinckney's plan conferred complete power of regulating both foreign and interstate commerce upon Congress, and expressed no intention to limit the control of that body over interstate trade.<sup>2</sup>

<sup>1</sup> *Doc. Hist. of the Const.*, iii., p. 125; Elliot's *Debates*, v., 191, 192.

<sup>2</sup> Nott, *The Mystery of the Pinckney Draft*, p. 299; Meigs, *Growth of the Constitution*, 135. It now appears that Pinckney is entitled to greater credit as an author of much of the Federal Constitution than was formerly conceded to him. Judge

In Randolph's original draft, the power was given to Congress "to regulate commerce" generally,<sup>1</sup> and no difference was stated between the extent of its authority over foreign and over interstate trade, except that certain restrictions were imposed upon its power to regulate foreign commerce. Rutledge amended Randolph's draft, by inserting after "commerce" the words, "both foreign and domestic," so that with his revision the clause came before the Committee of Detail in the following form: "To regulate commerce, both foreign and domestic." The generality of Randolph's original phrase and the terms of Rutledge's amendment make it quite plain that Rutledge, at least, believed he was conferring upon Congress similar power over both branches of commerce. To suppose that an experienced lawyer would have made such an amendment as Rutledge made, with an intent to vest in Congress a restricted authority over domestic trade, is to give no credit to Rutledge for the legal acumen his career shows he possessed.

The working members of the Committee of

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Nott's enthusiasm carries him perhaps too far in Pinckney's favor; but Prof. Jameson's judicious summary of the controversy over the draft allots Pinckney much credit. See "Studies in the History of the Federal Convention of 1787," by John Franklin Jameson, in *Annual Report of the American Historical Association* for 1904, vol. i., p. 132.

<sup>1</sup> Meigs, *Growth of the Constitution*, pp. 135, 136, and sheet 5 of his facsimile reprint of Randolph's draft.

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Detail were Randolph, Rutledge, and Wilson, all lawyers of note, and Wilson perhaps the foremost constitutional lawyer in the country. The facts just noticed indicate that Randolph and Rutledge had no intention of restricting the authority of Congress over interstate below its authority over foreign commerce. Wilson was one of the most extreme nationalists in the convention, and not less capable than his associates upon the committee in the use of words to express precise legal concepts. He is asserted to have been the most active member of the committee in preparing the draft of the Constitution, and the whole tenor of his thought upon the relation of the power of the central authority to that of the States forbids the assumption that he intended to restrict the power of Congress to regulate interstate commerce below what was implied in the general terms of the committee's report. And so we must conclude that the Committee of Detail intended to confer upon Congress equal power of regulating interstate and foreign commerce, except as they imposed certain restrictions upon the power of regulating the latter.

The report of the committee came before the convention on August 6th, and on August 16th the commerce clause as framed by the committee was adopted without dissent.\* The power was afterward enlarged, upon a suggestion by Madison,

\* *Doc. Hist. of the Const.*, iii., 545; Elliot, v., p. 434.

to include the regulation of trade with the Indian tribes, and after revision by the Committee on Style, assumed the form it now has in the Constitution: "The Congress shall have power——

"To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The report of the Committee of Detail had provided that no navigation act should be passed without the assent of two thirds of the members present in each house; and after the adoption of the commerce clause, Charles Pinckney, George Mason, and others made strenuous efforts to induce the convention to qualify the power of Congress over commerce by the proviso, that no act for the purpose of regulating the commerce of the United States with foreign powers or among the several States should be passed without the assent of two thirds of the members of each house. The struggle over this subject was continued until the compromise over the importation of slaves was reached, after which a sufficient number of members from the Southern States joined with the Northern members opposed to the proviso to defeat it, and to confer upon Congress power to pass navigation acts without the restriction of two-thirds majorities. This compromise became a subject of bitter opposition to the ratification of the Constitution in the State conventions, and the debates respecting it



confirm the inference that the Philadelphia Convention intended to confer upon Congress very large powers of regulating interstate as well as foreign commerce. For those delegates who favored the requiring of two-thirds majorities for the passage of commercial laws were so much in earnest, that we may be sure they stated all the serious objections they had to the commerce clause as adopted. But their objections went, not to the scope of the power in general, but to the passage of the laws by mere majorities. It does not appear that they desired to directly limit the constitutional power of Congress, but to diminish the liability of the passage of laws in the interest of one section of the country adverse to that of another section. Their object was two-fold: (1) to prevent legislation hostile to the non-mercantile States, by requiring for the passage of commercial laws majorities so large that no coalition of a few States would suffice to enact them; (2) to confine the passage of such laws to occasions of such general importance as would bring to their support all sections of the country. But the size of the majority required for the passage of a bill has no relation to the extent of the field within which Congress can legislate; and there is no indication in the debates that Mason, Pinckney, Randolph or their associates desired to limit the subjects to which the commercial power of Congress should extend. The

debates, therefore, rather strengthen than weaken the opinion, that there was no considerable opposition in the convention to the bestowal upon Congress of complete power of regulating commerce, among the States as well as with foreign nations, and this conclusion is supported by other occurrences near the close of the convention.

On September 14th, during a debate upon Mr. Madison's proposal, that power be given to Congress to grant charters of incorporation where the interests of the United States might require, and the legislative provisions of individual States might be incompetent, it was objected that such a power would include the granting of mercantile monopolies, and Mr. Wilson expressed the opinion that commercial monopolies were already included in the power to regulate commerce.<sup>1</sup> Mason objected to Wilson's view at the time, but afterwards came to the same opinion, and based one of the points in his opposition to the ratification of the Constitution upon the proposition that the power to regulate commerce included the power to create mercantile monopolies. "Under their own construction of the general clause at the end of the enumerated powers," Mason wrote, "the Congress may grant monopolies in trade and commerce."<sup>2</sup> The country at large

<sup>1</sup> *Doc. Hist. of the Const.*, iii., p. 745; Elliot, v., 544.

<sup>2</sup> Elliot, i., p. 496; Ford, *Pamphlets on the Constitution*, p. 331.

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took the view of Wilson and Mason, and the power of Congress to create monopolies under its power of regulating commerce was made the ground of opposition to the ratification of the Constitution in at least five of the States; led to proposals for amending the Constitution in several of the State conventions, and was accepted as established in the debates in the first Congress over certain constitutional powers of that body. If a law were enacted by Congress to-day creating a mercantile corporation with monopolistic powers over some branch of trade in interstate or foreign commerce, that act would be denounced as an unconstitutional and outrageous exercise of power. But the men who framed the Constitution and their contemporaries believed that this power had been conferred upon Congress. There is no indication in the debates in the convention, in the first Congress, or in the ratifying conventions, that the exercise of the power was restricted to foreign trade; upon the contrary, the discussions in the several bodies indicate a belief that the power to create monopolies was general, and extended as well to interstate as to foreign commerce. It is quite clear that a body of men who supposed they had conferred authority to create monopolies upon Congress, by a general grant of power to regulate interstate commerce, could not have intended that the general grant should be limited and mainly negative. Nor is

the force of this plain inference sensibly diminished by the action of the convention on proposals relating to corporations and canals in its last days.

On September 14th, a motion by Dr. Franklin, amended by Madison and Mason, to give to Congress the power to grant charters of incorporation for the cutting of canals where deemed necessary, was rejected by a vote of eight States to three<sup>1</sup>; and this vote was regarded as also disposing adversely of Madison's proposal to give to Congress the power to grant charters of incorporation where the interests of the United States might require, and the legislative provisions of individual States might be incompetent.<sup>2</sup>

This vote has been frequently cited as indicating an intention to limit the powers of Congress under its various specifically enumerated powers, and among others the power to regulate commerce. It is difficult to determine just what the vote does signify as to the intention of the convention. But when it is considered in connection with the debates in the ratifying conventions, the controversial pamphlets of the day, and the laws passed by the first Congress organized under the new government, the more reasonable opinion is that the objections to the power to cut canals, as well as to the power to grant charters of incorporations, were: (1)

<sup>1</sup> *Doc. Hist. of the Const.*, iii., 744-745; Elliot, v., pp. 543, 544.

<sup>2</sup> *Doc. Hist.*, iii., 744; Elliot, v., p. 543.

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that they were unnecessary in view of the provisions in the Constitution previously decided upon; (2) that neither the power to cut the canals, nor the power to grant charters of incorporation, was limited to cases in which they would have been tributary to the exercise of some one of the specifically granted powers. An objection to the proposal to give Congress power to cut canals may have been, for example, that it did not limit the authority to cases in which the canals would be aids to the transaction of interstate commerce, but would have permitted their construction entirely within a single State for purposes restricted to that State. And similarly, an objection to the proposal to confer upon Congress the power to erect corporations may have been that the authority would have been general, and not restricted to cases in which the corporations would have been incidental to the accomplishment of the purpose of some of the specifically granted powers. This is the view of the significance of the vote taken by Hamilton and others in the early years of the new government, and the large majority by which both houses of the first Congress passed the bill incorporating the United States Bank indicates it was the prevalent opinion of the public men of the constitutional era.

On September 17, 1787, after an eloquent and pathetic appeal by Dr. Franklin, the Constitution was signed and the convention adjourned *sine die*.

Copies of the instrument were sent to Congress and to the legislatures of the several States, and as soon as its terms became public, a discussion began, which continued until eleven of the thirteen States had ratified the Constitution and the new government was preparing to go into operation.

Now looking back over the course by which we have come, we see the effort to vest Congress with power to regulate commerce directed, first, to bestowing upon that body adequate power to regulate foreign commerce. It is then extended to include the regulation of interstate commerce. Movements to this end are continued in and out of Congress down to and even after the assembling of the Annapolis Convention; and they result at last in the commerce clause of the Constitution. If the general terms of the clause are fairly open to any question as to their meaning, that question seems to be resolved in favor of the broader interpretation, by comparing the clause with the terms of earlier proposals, as in the following list:

*New Jersey's Representations of 1778:* The sole and exclusive power of regulating the trade of the United States with foreign nations ought to be clearly vested in the Congress. (Elliot, i., p. 87.)

*Witherspoon's Resolution of 1781:* It is indispensably necessary that the United States in Congress assembled should be vested with a right of superin-

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tending the commercial regulations of every State, that none may take place which shall be partial or contrary to the common interests. (Elliot, i., p. 92.)

*Instructions of the General Assembly of Pennsylvania to their delegates in Congress, in December, 1783:* As the local exercise within the States of the power of regulating and controlling trade can result only in discordant systems productive of internal jealousies and competition, and illy calculated to oppose or counteract foreign measures, which are the effect of a unity of council, this House are clearly of opinion that the individual as well as general good-will will be best consulted by relinquishing to Congress all these separate and independent powers. (Bancroft, *Const.*, i., 335.)

*Resolution of the Philadelphia Town Meeting of June, 1785:* Resolved, that relief from the oppression under which the American trade and manufactures languish could spring only from the grant to Congress of full constitutional powers over the commerce of the United States. (Bancroft, i., p. 187.)

*Instructions of the Legislature of Rhode Island to their delegates in Congress, in October, 1785:* The United States in Congress assembled shall be solely empowered to regulate the trade and commerce of the respective States and the citizens thereof with each other. (Rhode Island *Schedules*, October, 1785, p. 10.)

*Report of Monroe's Committee to Congress in May, 1785:* The United States in Congress assembled, to have the sole and exclusive right and power . . . of regulating the trade of the States as well with foreign nations as with each other, and of laying such imposts

and duties upon imports and exports, as may be necessary for the purpose. (Sparks, *Washington*, ix., p. 503.)

*Report of Pinckney's Committee to Congress in August, 1786:* The United States in Congress assembled shall have the sole and exclusive power of regulating the trade of the States as well with foreign nations as with each other, and of laying such prohibitions, and such imposts and duties upon imports and exports, as may be necessary for the purpose. (Bancroft, *Hist. Const.*, ii., 374.)

*The Connecticut Plan of 1787:* That in addition to the legislative powers vested in Congress by the Articles of Confederation the Legislature of the United States be authorized to make laws to regulate the commerce of the United States with foreign nations, and among the several States. (*Biography of the Signers of the Declaration of Independence*, vol. iii., p. 270 *et seq.*)

*The New Jersey plan of 1787:* The United States in Congress shall be authorized to pass acts for the regulation of trade and commerce as well with foreign nations as with each other. (*Doc. Hist. Const.*, iii., p. 125.)

*Randolph's and Rutledge's draft of a Constitution:* The Congress shall have power to regulate commerce, both foreign and domestic. (Meigs, *Growth of the Const.*, pp. 135, 136.)

*The Constitution as adopted by the Convention:* The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. (Constitution, Art. 1, Sec. 8, paragraph 3.)



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These proposals indicate a steady development to a wider and yet wider conception of the power of Congress over the several branches of commerce. Proceeding from the regulations of foreign commerce only, they enlarge, through the force of circumstances, to include the regulation also of interstate commerce, and the terms of the successive propositions exclude the inference that the power to regulate interstate was narrower than the power to regulate foreign commerce. The history of the times and these successive proposals show that before the Constitutional Convention assembled the conviction had become widespread throughout the country, that Congress must be vested with complete power of regulating the several branches of trade. The provision in the Federal Constitution simply embodied this conviction in the framework of the government, and by its omission of any limitation upon the power to regulate commerce between the States followed the wishes of the country.

## CHAPTER IX

### THE CONSTITUTION BEFORE THE COUNTRY AND IN THE STATE CONVENTIONS—SCOPE ASSIGNED BY CONTEMPORARY OPINION TO THE COM- MERCIAL POWER OF CONGRESS

AS soon as the text of the Constitution became public a vehement controversy arose over its merits and demerits, which continued through the debates in the conventions of the several States to which it was referred for adoption or rejection. The discussion in these conventions and the controversial literature of that period inform us clearly of the opinion then entertained concerning the scope of the powers vested in Congress, and particularly of its authority over commerce.

The attitude of the State conventions toward the Constitution indicates that a different alignment of States had occurred from that which existed in the early days of the Philadelphia assembly. For, whereas, in the latter the smaller States were opposed to the radical change in the system of government effected by the Constitution,

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in the State conventions of every small State, excepting New Hampshire, the Constitution was adopted unconditionally. At Philadelphia the smaller States had wrested from the larger the right of equal representation in the Senate, and the fears aroused in that struggle, the arrogant attitude of the larger States, and apprehensions as to the future of the western territory, continued after the adjournment of the Constitutional Convention, and, it would seem, converted the smaller States to the belief that a strong central authority would be their safeguard against the larger States. Evidence of this change of attitude is contained in Ellsworth's advocacy of ratification in the Connecticut Convention, which was based directly upon the proposition that the Union created by the Constitution was necessary to protect the smaller against the larger States.<sup>1</sup>

This realignment is of much importance in our

<sup>1</sup> "Union is necessary to preserve commutative justice between the States. If divided, what is to prevent the large States from oppressing the small? What is to defend us from the ambition and rapacity of New York when she has spread over that vast territory which she claims and holds? Do we not already see in her the seeds of an overbearing ambition? On our other side there is a large and powerful State. Have we not already begun to be tributaries? If we do not improve the present critical time, if we do not unite,—shall we not be like 'Issacher' of old, a strong ass crouching down between two burdens? New Jersey and Delaware have seen this and have adopted the Constitution unanimously." (Ellsworth, in the Connecticut Convention, Jan. 4, 1788; Elliot's *Debates*, ii., p. 186.)

history; for it is one of the causes which insured the predominance of nationalist opinions and of the Federalist party in Congress and through the country in the first years of the new government, when precedents as to the scope of its powers were being created, and constitutional principles developed. It insured the ratification of the Constitution without changes affecting the nature of the new government or materially reducing its powers, and was therefore an agency in preserving to Congress that fulness of control over commerce which had been intended by the majority of the Philadelphia Convention.

The controversy over ratification also took a somewhat different course in the State conventions from that followed by the debates at Philadelphia. For, whereas, in the Constitutional Convention the greatest difference of opinion had been rather over the nature of the government than the extent of its powers, in the discussions over ratification, the nature of the government having been settled at Philadelphia, the powers vested in it attracted great attention. In the interval between the adjournment of the Constitutional Convention and the assembling of the State conventions, the nature of the new government and the powers vested in it, had become well known, and the consequences of endowing an independent government of the kind created by the Constitution with powers of the range set forth in that

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instrument attracted attention everywhere and were made the subject of vehement controversy. The discussions throughout the country and the debates in the State conventions, therefore, throw more direct light upon the scope assigned by contemporary opinion to the commercial and other powers of Congress than did the debates in the Constitutional Convention. And it is a consideration of much importance, in arriving at a just estimate of contemporary opinion concerning the scope of the powers of Congress, that there was not much difference between the views of those who favored and of those who opposed ratification, as to the extent of those powers; for all were agreed that the Constitution created a government of very great power, although the opposing parties differed widely as to the wisdom or unwisdom of erecting such a government. On the one hand, the opponents of ratification found in that instrument powers so great as to threaten the destruction of the States, the loss of civil liberty, and the coming in of aristocracy, monarchy, or tyranny. On the other hand, those who favored ratification approved the Constitution, for the very reason that it did vest great power in the central authority, and thereby determined, to apply the phrase used by Washington in a letter to Lafayette, of June 6, 1787, quoted above,<sup>1</sup> that they were to have a

<sup>1</sup> *Doc. Hist. of the Const.*, vol. iv., p. 185.

government of respectability, under which life, liberty, and property would be secured to them. If Congress possesses the powers ascribed to it by men of all parties in 1788, it is vested with authority more extensive than has yet been allotted to it by the most liberal decision of the Supreme Court. While the comments of a single controversialist might require to be much qualified, by allowances for rhetorical exaggeration, yet if we find a considerable body of documents in opposition to ratification substantially agreeing upon the grounds of their opposition, we are justified in concluding that they express a wide-spread contemporary view of the Constitution; and this condition is exhibited by the literature relating to the Federal Constitution, in the years 1787 to 1789, which represents that instrument as creating a central authority of very great power, and particularly with respect to the regulation of commerce.

It is also worthy of notice that, in this controversy, as in the Constitutional Convention, the advocates of the rights of the States were less united in opinion than were the partisans of a strong central government, and this is also particularly true with respect to the commercial powers of Congress. For while some of the opponents of ratification dreaded the consequence of vesting any central authority with powers over commerce as great as those bestowed upon

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Congress by the Constitution, others favored bestowing such powers on some central body, and would have been willing to vest them in a "federated" as distinguished from a "consolidated" government. Thus "Centinel," one of the ablest opponents of ratification, in his fourth paper in the *Independent Gazetteer or the Chronicle of Freedom*, for November 30, 1787, favored a transfer to Congress of the power of imposing imposts on commerce *and the unlimited regulation of trade*<sup>1</sup>; and examination of the debates and controversial literature of this period, as a whole, strongly impresses the reader with the conviction, that there were throughout the country large numbers of the mercantile classes who, however much they may have objected to a consolidated government, nevertheless strongly favored the vesting of very large powers over commerce, as well interstate as foreign, in whatever form of central government might be adopted.

It has been intimated that contemporary opinion of the scope of the powers of the new government is presented more fully in the writings of the opponents than of the friends of the Constitution; and this fact does not, perhaps, diminish the weight of the writings as contemporary expositions of that instrument, for they are at least not open to the charge of bias in favor of

<sup>1</sup> McMaster and Stone, *Pennsylvania and the Federal Convention*, p. 604. The emphasis is mine.

centralization. The importance of the documents opposed to ratification is also increased by the co-operation and the interchange of views among adversaries of the Constitution in different parts of the country, which were brought about by a society in the State of New York, organized in May, 1788, to effect unity of action in opposing ratification in the different States, and known as "Federal Republicans." Through this society correspondence was opened with leaders of the opposition to ratification in the several States, and such unity of sentiment and action thereby produced, that the views urged by a particular opponent of ratification in one of the States ceased to be merely individual opinions, and became the sentiments of considerable numbers of men in different parts of the country.<sup>1</sup>

While, however, the utterances of those who favored ratification are less explicit in reference to the extent of the commercial power of Congress than are the statements of their opponents they nevertheless confirm the view taken by the latter, and exhibit the power as one of great extent. Thus, Samuel Adams urged the ratification of the Constitution, in the Massachusetts Convention, because he considered "the article which empowers Congress to regulate commerce, to form treaties, etc." highly valuable.<sup>2</sup> Bowdoin,

<sup>1</sup> William Wirt Henry's *Patrick Henry*, ii., p. 341, *et seq.* N. Y., 1891.

<sup>2</sup> Elliot, *Debates*, ii., p. 124.



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in the same convention, emphasized the advantages of general regulation of trade by the central government as one of the benefits to be derived from ratifying the Constitution<sup>1</sup>; and Russell urged the power of restricting trade to American vessels conferred by the Constitution upon Congress as an inducement to ratification<sup>2</sup>; while Mr. Dawes advocated ratification, for the reason that Congress must have power of imposing protective duties in order to encourage domestic manufactures.<sup>3</sup> And that merchants, mechanics, and tradesmen in different parts of the country believed that the new Constitution vested Congress with the power of imposing protective duties on imports, is indicated in the numerous petitions which came up to the new Congress in 1789, requesting the imposition of such duties. The phrasing of the petition from the tradesmen, mechanics, and others, of the city of Baltimore, so clearly expresses the opinion of the petitioners, as to the connection of the power to impose the duty with the Constitution, that it deserves quotation:

The happy period having now arrived [say the petitioners], when the United States are placed in a new situation, when the adoption of a general government gives one sovereign legislature the sole and ex-

<sup>1</sup> Elliot, *Debates*, ii., p. 83.

<sup>2</sup> *Ibid.*, p. 139.

<sup>3</sup> *Ibid.*, p. 59.

clusive power of laying duties upon imports, your petitioners rejoice at the prospect this affords them, that America, freed from the commercial shackles which have so long bound her, will see and pursue her true interests, becoming independent in fact as well as in name; and they confidently hope that the encouragement and protection of American manufactures will claim the earliest attention of the Supreme Legislature of the nation; as it is a universally acknowledged truth that the United States contain within their limits resources amply sufficient to enable them to become a great manufacturing country, and only want the patriotism and support of a wise, energetic government.<sup>1</sup>

Mr. Thompson's book, from which the foregoing is quoted, also cites other petitions from mechanics and manufacturers of the cities of New York and Boston of similar tenor; and it is clear that in the period between the adjournment of the Philadelphia Convention and the inauguration of the new government, a general belief existed throughout the country that the Constitution empowered Congress to impose protective duties upon imports, although the authority was then referred rather to the clause relating to taxation, than to that relating to commerce.

We have seen, that in the Constitutional Convention the opinion was advanced by Wilson,

<sup>1</sup> *The History of Protective Tariff Laws*, by R. W. Thompson, ex-Secretary of the U. S. Navy, p. 38 *et seq.* (3d ed., Chicago, 1888). See *American State Papers*, Finance, vol. i., p. 5.

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that under the power to regulate commerce Congress could create commercial monopolies. That the country at large was of this opinion, is evident from the fact that the conventions of five States—Massachusetts, New Hampshire, New York, North Carolina, and Rhode Island—thought it necessary to prevent the exercise of such a power by express amendments to the Constitution.\* Thus, in Massachusetts the convention accompanied its ratification by the recommendation to Congress, that the following amendment, among others, be adopted:

“V. That Congress erect no company of merchants with exclusive advantages of commerce.”

In New York the recommendation took the form: “That the Congress do not grant monopolies or erect any company with exclusive advantages of commerce”; and in New Hampshire, North Carolina, and Rhode Island the recommendation was expressed in equivalent and nearly identical terms.

\* Mass., Elliot, *Debates*, ii., p. 177; N. Hampshire, Elliot, i., p. 326; New York, Elliot, i., p. 330; N. Carolina, Elliot, iv., p. 246; Rhode Island, Elliot, i., p. 337. Rhode Island and North Carolina did not ratify the Constitution until after the new government went into operation. The amendment respecting monopolies was proposed in the North Carolina Convention, which convened on 21st of July, 1778, and adjourned without ratifying the Constitution. The State ratified the Constitution on November 21, 1789.

In Virginia George Mason based one of his principal objections to the Constitution upon its vesting in Congress the power to create commercial monopolies, which, he predicted, would be utilized by northern merchants to the injury of the South. He enlarged upon this matter in his pamphlet entitled: "The Objections of the Honorable George Mason to the proposed Federal Constitution. Addressed to the Citizens of Virginia,"<sup>2</sup> in which, as I have noted above, he urged that the requirement of simple majorities for the making of all commercial and navigation laws would facilitate the creation of monopolies, and explained their connection with the Constitution as follows:

<sup>2</sup> *Pamphlets on the Constitution, 1787-8*, edited by Paul Leicester Ford, p. 331. Iredell attempted an answer to this objection of Mason's, which seems to me weak in point of law, as well as contrary to the prevalent opinion of the day. For Iredell finds in the clause of the Constitution forbidding the giving of a preference to the ports of one State over those of another an effectual restriction upon the power to create monopolies, whereas this clause would seem to have no relation to the subject, and it is certain that so able constitutional lawyers as Wilson and Hamilton, and the general sentiment of the country, affirmed the power of Congress to create monopolies under the commerce clause. Iredell also seems to be of the opinion that particular monopolies, which might severally promote the industries of particular States, would be advantageous rather than otherwise, and permissible under the Constitution. See "Answer to Mr. Mason's objections to the New Constitution, recommended by the late Convention. By Marcus" in Ford's *Pamphlets on the Constitution*, pp. 356-359.

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Under their own construction of the general clause at the end of the enumerated powers, the Congress may grant monopolies in trade and commerce, constitute new crimes, inflict unusual and severe punishments, and extend their power as far as they shall think proper; so that the State legislatures have no security for the powers now presumed to remain to them, or the people for their rights.

In Massachusetts the essays of "Agrippa," accredited to James Winthrop, declared that under the Constitution Congress had the "unlimited right to regulate commerce, external and internal, and [might] therefore create monopolies which have been universally injurious to all the subjects of the countries that have adopted them, except the monopolists themselves."<sup>1</sup> In another essay he further considered the power of Congress over commerce, as evidencing the consolidation of the government which was affected by the Constitution, saying:

The idea of consolidation is further kept up in the right given to regulate trade. Though this power under certain limitations would be a proper one for the Department of Congress; it is in this system carried much too far, and much further than is necessary. . . . The unlimited right to regulate trade includes the right of granting exclusive charters. . . . This, in all old countries, is considered as one principal branch of prerogative. . . . There

<sup>1</sup> Ford, *Essays on the Constitution*, p. 97.

ought, then, to have been inserted a restraining clause which might prevent the Congress from making any such grants, because they consequentially defeat the trade of the out-ports, and are also injurious to the general commerce, by enhancing prices and destroying that rivalry which is the great stimulus to industry.<sup>1</sup>

Pursuing the same subject in his thirteenth essay, Agrippa concluded that, under the commerce clause, Congress had the unlimited right to regulate commerce, external and internal, and might therefore create monopolies. That under another clause they had the unlimited right to imposts and all kinds of taxes, as well to levy as to collect them. "They have indeed," he says, "very nearly the same powers claimed formerly by the British Parliament."<sup>2</sup>

Agrippa's view of the extent of the power of Congress over interstate commerce did not at all agree with that presented by opponents of recent legislation for controlling the great commercial combinations, who have insisted that contemporary views of the Constitution allowed but limited scope to the power. For one of Agrippa's chief objections to ratifying the Consti-

<sup>1</sup> Ford, *Essays on the Constitution*, pp. 70-71.

<sup>2</sup> It was determined by Marshall, in *Gibbons vs. Ogdens* (9 Wheat., 1), in 1824, that the power to regulate interstate as well as foreign commerce is vested in Congress as absolutely as it would be in a unitary government, which had in its constitution only those restrictions which are found in the Federal Constitution.

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tution was that the power was far greater than it should have been, and he proposed to correct the error by an amendment to the Constitution which would have taken from Congress authority to regulate intercourse between the States.\*

The letters of Agrippa were among the ablest publications of their time in opposition to ratification. They were much noticed in their day, the principles of their opposition to the Constitution were similar to arguments advanced by others, but less forcibly, and we must suppose these principles were not peculiar to Agrippa, but were commonly shared by those who opposed ratification. Thus considered, and combined with the views of Mason, Melancthon Smith, Patrick Henry, and others, they show clearly that a great body of opinion throughout the Union, in 1788, attributed wide range to the power of Congress over interstate commerce.

We have seen that among the specific powers conferred upon Congress by the Constitution, in the estimation of the men of this period, were those of levying protective duties upon imports and of creating corporations even with monopolistic privileges of trade. There seem to be no express affirmations or denials, at this time, of the power of Congress to construct highways of interstate commerce, but a contemporary opinion that

\* See Agrippa's letter to the Massachusetts Convention, of February 5, 1788, in Ford's *Essays on the Constitution*, p. 118.

Congress possessed such power is at least indicated in the proposal of Samuel Jones, in the New York Convention, that the Constitution be so amended as to deprive Congress of the authority of "laying out, making, altering, or repairing highways in any State, without the consent of the Legislature of such State."<sup>1</sup> For he would hardly have moved such an amendment, had he not believed that the Constitution conferred the power, under the post-roads' clause, which he was then considering. It is also noticeable that Jones believed that the power was possessed by Congress in such fulness that, unless the Constitution were amended, it could be exercised without the consent of the State or States affected, and that the debate indicates no opposition to his opinions. I have given in an Appendix the reasons which indicate the existence of a widespread opinion, about this period, that Congress had the power, under one or another clause of the Constitution, to undertake or authorize the undertaking of highways of interstate commerce, and it is probable that Jones's proposed amendment is simply one indication of this belief.

To ~~summarize~~ the results of the preceding inquiry into the state of opinion as to the powers of Congress, during the ratification controversy, it appears that the commerce clause was then

<sup>1</sup> Elliot's *Debates*, ii., p. 406.



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understood to convey a very complete authority of regulating foreign and interstate commerce upon Congress; and that under the commerce and other clauses of the Constitution, Congress had, among other powers, specifically those of levying duties on imports, of creating corporations and companies to conduct foreign or interstate commerce, of creating monopolies with respect to the several branches of commerce, of imposing restrictions and embargoes upon its several branches, and of improving the highways of interstate trade.<sup>1</sup>

<sup>1</sup> From the earliest days until the present the power to improve highways of foreign commerce, such as harbors and navigable rivers opening into the sea, has been so well established, that it has not been necessary to consider it.

## CHAPTER X

### THE FIRST CONGRESS UNDER THE CONSTITUTION— THE FIRST TARIFF BILL—THE AMENDMENTS TO THE CONSTITUTION—THE UNITED STATES BANK BILL

THE measures and debates of the first Congress are important aids to determining the scope assigned by contemporary opinion to the powers of that body; for upon this Congress fell the work of organizing the new government, providing its revenues, and developing the machinery for its administration. Washington, President of the Republic, had also been President of the Constitutional Convention. In his Cabinet were Randolph, proposer of the plan out of which the Constitution developed, and Hamilton, the principal writer of *The Federalist*. In the Supreme Court were Jay, Chief Justice, also a writer of *The Federalist*, and Wilson who had perhaps most to do in preparing the draft of the Constitution as submitted by the Committee of Detail. In the two Houses of Congress there were at least sixteen members who had sat in the Federal Convention, and among them were:

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Madison, Paterson, Sherman, Gerry, King, Ellsworth, Clymer, and Robert Morris, all of whom had taken prominent parts in the formulation of the Constitution, and numerous other members had sat in the State conventions. The administration and the first Congress therefore comprised a body of men unique in our history for personal knowledge of the meaning assigned to the Constitution by contemporaries of its framing. Three of their measures, in particular, throw light upon the contemporary understanding of the scope of the commerce clause; these are: the first tariff bill, the amendments to the Constitution, and the bill incorporating the United States bank, and they will be considered in this order.

### *The First Tariff Bill*

Even before the inauguration of Washington, on April 9, 1789, Madison introduced a bill to provide revenues for the government. In its original form it was practically a revenue measure based upon the proposals of the old Congress in 1783, but a sentiment in favor of protecting domestic industries by duties upon imports soon developing, Madison acquiesced, and the bill became a protective measure, as was explicitly avowed in its preamble: "Whereas, it is necessary for the support of the government, for the discharge of the debts of the United States, and the

encouragement and protection of manufactures, that duties be laid on goods, wares, and merchandise, imported.”<sup>1</sup>

As the bill progressed through the two Houses of Congress numerous amendments were made, adding new articles to the dutiable list and increasing the duty on other articles, until, among a large number of commodities taxed by the bill, it levied duties on the following articles in common use: soap, boots, shoes, slippers or galoshes made of leather, tarred cordage, cables, steel unwrought, nails and spikes, salt, manufactured tobacco, gloves of leather, leather, tanned or untanned, and manufactures of leather, castings of iron and split and rolled iron, anchors, wrought tin, and pewter ware.<sup>2</sup>

The bill aroused an earnest and even acrimonious debate over the practical advantages or disadvantages of levying particular duties, or any duties for protection; and many of the arguments used were curiously modern. Propositions stated in recent tariff debates, sometimes as if they were discoveries of the debaters, were used in this first tariff controversy in the Republic one hundred and twenty years ago; and some of the conflicts of opposing interests, which have seemed original with our day, were brought to light in 1789.

That the tariff is a local issue was certainly

<sup>1</sup> *Annals of Congress* (1st Cong.), vol. ii., 2129 (ed. 1834).

<sup>2</sup> *Annals of 1st Congress*, ii., 2129.

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not a discovery of General Hancock, in 1880; for much of the debate of 1789 turns upon it. At that earlier date the same man who advocated protection for the industries maintained by his locality, opposed duties desired by members from other localities, because the latter would be injurious to his constituents.<sup>1</sup> In this debate, also, as often since, the interests of "agriculture and the husbandman" were represented as opposed to those of the merchant and manufacturer; and "infant industries" made their appearance in debate in 1789, but at that time on the opposite side from that in support of which they have been latterly cited. For in that early time, Mr. Bland considered that the infancy of the industries was an objection to high protective duties. Some degree of encouragement to home manufactures, he thought, might be proper; but, "it was a well known fact, that the manufacturing arts in America were only in their infancy and far from being able to answer the demands of the country; then certainly you lay a tax upon a whole community, in order to put money in the pockets of a few whenever you burden the importation with a heavy impost." <sup>2</sup>

<sup>1</sup> Fisher Ames, for example, was a strong protectionist with respect to those interests in which protection benefited Massachusetts, but he was quite strongly opposed to a duty on molasses, because it might injure the carrying trade of Massachusetts. (*Annals*, 1st Cong., i., 133.)

<sup>2</sup> *Annals*, 1st Cong., i., 124.

In 1789 the "agriculturist and the husbandman" claimed equal right with the merchant and manufacturer to be favored by governmental care, and a duty on hemp was considered a partial discharge of the equal obligation of the government<sup>1</sup>; and it was already plain to Mr. Scott, of Pennsylvania, that in the matter of protection, manufactures and agriculture must stand or fall together. So he favored a small duty on hemp, for agriculture was entitled to its proportion of encouragement; so were manufactures and commerce.<sup>2</sup>

Modern tariff legislation has made us familiar with the pushing up of the duty on one commodity to compensate the manufacturer for the duty placed by the same bill upon another, and this practice originated, or at least was early followed, in the United States, by the first Congress, which raised the duties on cables and cordage to make up for the duty on hemp<sup>3</sup>; and a bounty on the American product instead of a duty was proposed by Hartley, because the existence of manufactures and ship-building was involved in maintaining a low price for the raw material.<sup>4</sup>

Steel proved then, as often since, provocative of much dispute. Lee and Tucker opposed a duty upon it, as oppressive to agriculture,<sup>5</sup> but

<sup>1</sup> *Annals*, 1st Cong., i., 150.

<sup>2</sup> *Ibid.*, 154.

<sup>3</sup> *Ibid.*, 209.

<sup>4</sup> *Ibid.*, 153.

<sup>5</sup> *Ibid.*, 147.

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Clymer approved of the duty for the reason, often advanced since, that he "deemed it prudent to emancipate our country from the manacles in which she was held by foreign manufactures."<sup>1</sup>

While, however, the debate was earnest on practical questions, it did not touch on the constitutional power of Congress to levy duties for protection; and this silence, in connection with the frankly avowed protective purpose of the bill, is strongly corroborative of the conclusion, that the members of the first Congress quite generally believed that body had power under the Constitution to lay duties for that purpose. For it is unlikely that had any considerable number of members of Congress then believed the bill transcended the powers of that body, they would have refrained from advancing so radical an objection during so earnest a debate. That they did not advance the objection is strong proof they did not entertain it; and that Madison, in 1789, although theoretically for free trade, believed Congress had constitutional authority to levy protective duties, is clear from the terms of his speeches in support of the first tariff bill and of the tonnage bill of the same year, in which he stated the relation of the central government under the Constitution, to the protection of various industries, and expressed a principle of constitutional interpretation which has often been

<sup>1</sup> *Annals*, 1st Cong., i., 147.

cited since his time.<sup>1</sup> His exposition is so clear that I here quote from both speeches:

The States that are most advanced in population, and ripe for manufactures [he said in support of the first Tariff bill] ought to have their particular interests attended to in some degree. While these States retained the power of making regulations of trade, they had the power to protect and cherish such institutions; by adopting the present Constitution they have thrown the exercise of this power into other hands; they must have done this with an expectation that those interests would not be neglected here.<sup>2</sup>

Gentlemen who are opposed to giving sufficient encouragement to ship-building [he said, when supporting the Tonnage bill] ought to recollect an argument that was considered of weight in the case of encouraging manufactures. It is certain that manufactures have been reared up by the fostering care of the State legislatures, displayed in the shape of protecting duties; but the people, by the adoption of this Constitution have put it out of their power to continue them. The provision for the support of navigation, made by the several States, ought to induce us to suppose even a higher tonnage duty pleasing to them, at least in those States where a higher tonnage duty has been laid. Those States,

<sup>1</sup> The principle that various powers of the States under the Confederacy, and essential to the conduct of government, were not extinguished by the Constitution, but passed to the general government.

<sup>2</sup> Speech of April 9, 1789, in Hunt's *Writings of Madison*, vol. v., p. 341, also pp. 343, 345, 350, 351.



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not being able to continue their encouragement, expect that we will attend to their policy, and protect their citizens in the property they were led to acquire under the State regulations. If we disappoint them, they will suffer more than is consistent with good policy. I am not apprehensive that forty cents will be so low as to occasion any discontent.<sup>1</sup>

That Congress and the country at this time entertained no serious doubt of the constitutional power of Congress to levy duties for protection, is further indicated by the passage of the bill of July 20, 1789, just referred to, by which discriminating duties were imposed against vessels owned in whole or in part by subjects of foreign powers, and against vessels not built in the United States; also by the enactment of the law of May 2, 1792,<sup>2</sup> increasing duties; and by the support given in the House of Representatives to the restrictive and discriminating system proposed by Jefferson and Madison in 1794. The conclusion from a survey of the work of the first Congress and of Washington's first administration must therefore be, that the men who organized the government under the Constitution, did not agree with the contention of later opponents of protective tariffs, that the Constitution gave to Congress no power to enact them. The early statesmen

<sup>1</sup> Annals, 1st Cong., i., p. 285. The text of the bill is in Annals, 1st Cong., ii., p. 2132.

<sup>2</sup> Annals, 2d Cong., 1364. (Ed. 1849.)

may have objected to the imposition of duties on economic and political grounds, but they did not deny the authority to levy them.

*The Amendments to the Constitution*

The conventions in several of the States having accompanied their ratifications of the Constitution with proposals for amendments, some irritation arose over the delay of Congress to enter upon the subject. Virginia therefore prepared a memorial on the matter which was presented to the House of Representatives, on May 5, 1789, where it encountered some opposition because of the fear of several members that the process of amending the Constitution would open up the entire question of the nature of the government, and might result in the overthrow of the new system, which it would be impossible to replace. The recollection of the disorders out of which the Constitution arose, and of the difficulties attending upon its drafting and ratification, inclined influential members of Congress to look with fear upon the attempt to amend it, which they then considered would be inseparable from a reopening of the entire question of the nature of the government. Madison was, however, particularly obligated to favor amendments of the Constitution, because of statements expressing his support of that policy which he had

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made during his candidacy for election to the House of Representatives.<sup>1</sup> He therefore brought up the subject on June 8, 1789, and upon his urgency the House entered seriously upon the consideration of the amendments. Madison suggested nine, the greater number of which related to what has come to be termed a "bill of rights," and do not particularly concern this inquiry. Parts of his fourth and his eighth propositions were, however, important, and as stated by him were as follows:

Fourthly: The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.<sup>2</sup>

Eighthly: That immediately after Article 6, be inserted, as Article 7, the clauses following, to wit:

The powers delegated by this Constitution are appropriated to the departments to which they are respectively distributed; so that the legislative department shall never exercise the powers vested in the executive or judicial, nor the executive exercise the powers vested in the legislative or judicial, nor the

<sup>1</sup> See Madison's letters to Washington, January 14, 1789, in Hunt, v., p. 319, and to George Eve, January 2, 1789, quoted in Hunt, ii., pp. 319, 320.

<sup>2</sup> Annals, 1st Cong., i., p. 436.

judicial exercise the powers vested in the legislative or executive departments.

The powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States respectively.

The matter quoted from the fourth proposition became the basis of the Ninth Amendment to the Constitution, the second member of the eighth proposal is now embodied in the Tenth Amendment, and the first member thereof was not incorporated into any amendment, but its principle has become well settled in American constitutional law.

In his speech accompanying the amendments, Madison explained his purpose quite in accordance with the moderate views of the time, to be to procure such amendments as were demanded by the country and could be accomplished without opening the door for reconsideration of the whole structure of the government.

I should be unwilling [he said] to see a door opened for a reconsideration of the whole structure of the government—for a reconsideration of the principles and the substance of the powers given; because I doubt, if such were opened, we should be likely to stop at a point which would be safe to the government itself. But I do wish to see a door opened to consider, so far as to incorporate those provisions for the security of rights, against which I believe no serious objection has been made by any

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class of our constituents; such as would be likely to meet with the concurrence of two thirds of both Houses and the approbation of three fourths of the State legislatures.<sup>1</sup>

With respect to the reservation of powers to the State, suggested in his eighth proposition, he added:

I find, from looking into the amendments proposed by the State conventions, that several are particularly anxious that it should be declared in the Constitution, that the powers not therein delegated should be reserved to the several States. Perhaps other words may define this more precisely than the whole of the instrument now does. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it.<sup>2</sup>

On July 21st, the subject was referred to a grand committee of eleven, which included five members who had sat in the Constitutional Convention.<sup>3</sup> Their report was considered in Committee of the Whole on August 13th, and Mr. Sherman's proposal that the amendments be added to the Constitution by way of supplement, which had been formerly defeated, was carried on August

<sup>1</sup> *Writings of Madison*, Hunt, v., p. 375.

<sup>2</sup> *Ibid.*, pp. 387, 388.

<sup>3</sup> *Annals*, 1st Cong., i., pp. 664, 665. (Edition 1834.)

19th.<sup>1</sup> The House finally framed seventeen amendments, which the Senate reduced to twelve, and the House concurring these were sent to the several States for adoption or rejection. The last ten of the twelve submitted having been accepted by a sufficient number of States, became the first ten amendments to the Constitution.

Of special importance in ascertaining the scope of the implied authority of Congress under the express power to regulate commerce is, of course, the Tenth Amendment, which is based on the second member of Madison's eighth proposition. Concerning the effect of this upon implied powers great differences of opinion have existed from the time of the first Congress until now, and certain actions in that body concerning this particular amendment throw much light upon the interpretation which the majority of the House of Representatives, at least, gave to it. For two attempts to insert into this amendment the word "expressly," so that all powers not expressly delegated to the United States, or prohibited to the States, would have been reserved to the States or to the people, were defeated.<sup>2</sup>

To the first of these attempts Madison objected, because it was impossible to confine a

<sup>1</sup> *Annals*, 1st Cong., i., pp. 765, 766.

<sup>2</sup> Tucker's motion defeated August 18, 1789, *Annals* 1st Cong., i., pp. 761, 790; Gerry's motion defeated August 21, 1789, *Annals*, 1st Cong., i., pp. 767, 768.

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government to the exercise of express powers; there must necessarily be admitted powers by implication, unless the Constitution descended to recount every minute particular. He remembered the word "expressly" had been moved in the Convention of Virginia, by the opponents of ratification, and, after full and fair discussion, was given up by them, and the system allowed to retain its present form.<sup>1</sup> Sherman, agreeing with Madison, observed "that corporate bodies are supposed to possess all powers incident to the corporate capacity, without being absolutely expressed."<sup>2</sup> The defeat in the House of Representatives of both attempts shows that a majority of that body agreed with Madison and Sherman, and the passage of the bill incorporating the United States Bank by this same Congress indicates that more than two thirds of the members of both Houses were then of the opinion, that the Tenth Amendment, in the form in which it passed the first Congress and was accepted by the States, did not materially limit the range of the implied powers to which Congress may resort as incidental to the grant of the several enumerated powers.

### *The Bill to Incorporate the United States Bank*

While the amendments to the Constitution were pending in the several States the bill to

<sup>1</sup> Annals, 1st Cong., 1st Sess., i., p. 761.

<sup>2</sup> *Ibid.*

incorporate the United States Bank was introduced in the Senate, on January 3, 1791, was passed by both Houses of Congress by large majorities, and approved by Washington, after considerable hesitation upon constitutional grounds.\* As was admitted at the time, the Constitution granted no express authority to Congress to create the bank or any other corporation, and the bill was supported expressly upon the ground, that power to enact it was derived by implication, and under the necessary and proper clause, from one or another of several enumerated powers of Congress, including that to regulate commerce. The passage of the bill, therefore, becomes an important exhibition of the opinion of a large majority of Congress upon the right of that body under the implied powers, to create corporations as agencies to carry into effect the commercial powers of Congress, and that even to the extent of investing such corporations with monopolistic privileges. In the enactment of this measure, therefore, the large majority of Congress approved the view taken by Wilson in the Constitutional Convention, that under the commerce clause, Congress had the power to create companies with monopolistic privileges, a view which we have

\* The act incorporating the bank, approved Feb. 25, 1791, is in *Annals*, 1st Cong., ii., p. 2312. The supplemental act relating to subscriptions to the bank is in *Annals*, 1st Cong., ii., p. 2318.



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seen confirmed by the propositions for amending the Constitution made in five of the States, and by the opposition to ratification of the Constitution based upon the possession by Congress of such a power.

The bill resulted from the report by Alexander Hamilton to the House of Representatives, on December 14, 1790, recommending the creation of the bank.<sup>1</sup> On December 23, 1790, the Senate appointed a committee consisting of Strong, Morris, Schuyler, Butler, and Ellsworth to prepare a bill. As reported on January 3, 1791, it formed the subscribers of the Bank of the United States into a corporation, with a capital not to exceed \$10,000,000; and by the twelfth section of the sixteenth article bestowed an actual monopoly in the provision, that no other bank should be established by any future law of the United States during the continuance of the corporation created by the bill; for which the faith of the United States was thereby pledged.<sup>2</sup> The bill encountered but little opposition in the Senate, and was passed by a majority of more than two thirds, on January 20, 1791.<sup>3</sup>

The measure was taken up in the House of Representatives on February 1, 1791, became

<sup>1</sup> Annals, 1st Cong., vol. ii., p. 2032. The report is also contained in Lodge's edition of *Works of Hamilton*, vol. 13, p. 125.

<sup>2</sup> Annals, 1st Cong., ii., p. 1741, 2312.

<sup>3</sup> *Ibid.*, p. 1748.

the subject of an ardent debate upon the constitutional powers of Congress, and was passed on February 8, 1791, by thirty-nine in favor to twenty opposed to the bill.<sup>1</sup> Thus, rather more than two thirds of the members voting in both Houses of Congress approved the bill. It then went to President Washington, who at first entertained grave doubts as to its constitutionality, and took the opinions of his Cabinet upon it; Jefferson and Randolph opposing and Hamilton and Knox favoring the bill. Upon consideration of the opinions of his Cabinet officers Washington finally signed the bill, which became a law on February 25, 1791.

The most important questions considered in the debate were: "Did the general clause of the Constitution authorize the incorporation of the bank, as incidental to some of the expressly enumerated powers of Congress?" and "What did 'necessary and proper' signify in that clause?"

Upon the one hand it was contended against the bill that the grant of power to the Federal Government was not a general grant, out of which particular powers were excepted; it was a grant of particular powers only, leaving the general mass in other hands.<sup>2</sup> The interpretation which authorized the incorporation of the bank de-

<sup>1</sup> *Annals*, 1st Cong., ii., p. 1960.

<sup>2</sup> *Madison*, in *Annals*, 1st Cong., ii., p. 1896; *Hunt*, vi., p. 27.

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stroyed the characteristics of the government. This interpretation was opposed to contemporary and concurrent expositions of the Constitution. Upon the principle assumed by supporters of the bill, by the cabalistic word, *incident*, the Constitution is turned upside down, and instead of being a grant of particular powers, guarded by an implied negative to all others, it is made to imply all powers.<sup>1</sup>

Moreover, the bill created a monopoly of a very extraordinary nature—a monopoly of public money for the benefit of the corporation to be erected. If the sweeping clause extended to vesting Congress with the powers granted by the bill, Congress would soon be in possession of all possible powers, and the charter under which they sat would be nothing but a name.<sup>2</sup> For the essential characteristic of the government, as composed of limited and enumerated powers, would be destroyed, if instead of direct and incidental means, any means could be used which, in the language of the preamble to the bill, “might be conceived to be conducive to the successful conducting of the finances, or to tend to give facility to the obtaining of loans.”<sup>3</sup>

The incorporation of the bank could not be

<sup>1</sup> Stone, in *Annals*, 1st Cong., ii., p. 1932.

<sup>2</sup> Jackson, in *Annals*, 1st Cong., ii., p. 1917.

<sup>3</sup> Madison, in *Annals*, 1st Cong., ii., p. 1898; Hunt, vi., pp. 19-42.

justified under the general clause as means "necessary and proper" for carrying into execution any of the powers to which it had been referred. For the meaning of the phrase must be limited by the plain and obvious force of the terms of the context, to such as are necessary to the end, and incident to the nature of the specific powers.<sup>1</sup> Moreover the bank was not a necessary means, for all the enumerated powers could be carried into execution without a bank.<sup>2</sup> With respect to the power of regulating commerce in particular, it was denied that the incorporation of a bank had anything to do with trade. "To erect a bank, and to regulate commerce, were very different acts, and moreover the incorporation of the bank would be void, as extending as much to its internal as to its external trade. The power to create corporations was not conferred by the power to regulate commerce. For as to foreign nations, the power was given: (1) to prohibit them or their commodities from our ports; (2) to impose duties on them where none existed before, or to increase existing duties on them; (3) to subject them to any species of custom-house regulations; or (4) to grant them any exemptions or privileges which policy might suggest. And with respect to interstate trade, the heads of the power

<sup>1</sup> Madison where last cited.

<sup>2</sup> Jefferson's opinion to Washington in Ford's edition of *Writings*, v., p. 284 *et seq.*

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were said to be little more than to establish the forms of commercial intercourse between the States and to keep the prohibitions which the Constitution imposes on that intercourse undiminished in their operation; that is, to prevent taxes on imports or exports; preferences to one port over another, by any regulation of commerce or revenue; and duties upon the entering or clearing of the vessels from one State to the ports of another.<sup>1</sup>

It was further said in opposition that the power to incorporate a bank had been assumed to be an accessory or subordinate power. But it was, in its nature, a distinct and substantial prerogative, which not being enumerated in the Constitution could never have been meant to be included in it, and not being included, could not be rightfully exercised.<sup>2</sup> There was a distinction between a power necessary and proper for the government, and a power necessary and proper for carrying out the enumerated powers. The latter might be implied, the former could not be, and the power to incorporate the bank belonged to the former class. And pursuing this principle, it was further objected that the power to incorporate the bank could not be implied until the exercise of the authority was

<sup>1</sup> Randolph's opinion in *Legislative and Documentary History of the Bank of the United States*, Washington, 1832, pp. 86 *et seq.*

<sup>2</sup> Madison, *Annals*, 1st Cong., ii., p. 1900; Hunt, vi., p. 33.

proved to be necessarily connected with some of the enumerated powers, and here the argument for the bank was said to have failed. For the authority to incorporate the bank was not an incidental or subordinate authority but rather a principal one. It was a distinct, substantive branch of legislation, and perhaps paramount to any of the enumerated powers to which it had been referred.<sup>1</sup>

Finally, the Ninth and Tenth Amendments took from Congress the power to incorporate the bank. The restrictive clause in the Tenth Amendment afforded no pass over its limit, to sustain the constitutionality of the bill.<sup>2</sup> "To take a single step beyond the boundary thus specially drawn around the powers of Congress was to take possession of an unbounded field of power, no longer susceptible of any definition."<sup>3</sup>

For the bill it was contended, upon the other hand, that

every power vested in a government is in its nature, sovereign, and includes, by force of the term, a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the Constitution, or not immoral, or not contrary to the essential ends of society.

<sup>1</sup> Giles, in *Annals*, 1st Cong., ii., p. 1941.

<sup>2</sup> Madison, in *Annals*, 1st Cong., ii., p. 1957; Hunt, vi., p. 38.

<sup>3</sup> Jefferson's opinion in Ford, vi., p. 285.

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The circumstance, that the powers of sovereignty were in this country divided between the National and State Governments did not affect the distinction, it cannot follow from this, that each of the portions of power delegated to one or the other, is not sovereign with regard to its proper object. It would only follow from it that each had sovereign power as to certain things, and not as to other things.<sup>1</sup>

Whenever a power was delegated for express purposes all the known and usual means for the attainment of the object expressed were conceded also.<sup>2</sup> Congress was authorized to regulate foreign and domestic trade, and to make all laws, necessary and proper, to carry these and other enumerated powers into effect. If banks were among the known and usual means to effectuate or facilitate the ends which have been mentioned, to enable the government with the greatest ease and least burden to the people to collect taxes, borrow money, regulate commerce, raise and support armies, provide and maintain fleets, the argument was irrefragable and conclusive to prove the constitutionality of the bill.<sup>3</sup>

For answer to the objection that the bill created a monopoly, it was said that by the amendments proposed by New Hampshire, Massachusetts, and

<sup>1</sup> Hamilton's opinion to Washington in Lodge's edition of his *Works*, iii., pp. 180, 181.

<sup>2</sup> Sedgwick, in *Annals*, 1st. Cong., ii., p. 1911, *et seq.*

<sup>3</sup> *Ibid.*, pp. 1911, 1912.

New York, it plainly appeared that these States considered that Congress did possess the power to establish companies with monopolistic privileges<sup>1</sup>; and Hamilton, pursuing this point, referred to the amendments proposed by several States, as showing that in their opinion the power of erecting trade companies or corporations was inherent in Congress, and as objecting to it no further than as to the grant of exclusive privileges.<sup>2</sup>

The words "necessary and proper" did not restrict the power of the legislature to the enactment of such laws only as were indispensable.

Such a construction would be infinitely too narrow and limited; and to apply the meaning strictly would prove, perhaps, that all the laws which had been passed were unconstitutional, for few if any of them could be proved indispensable to the government. The great ends to be obtained as means to effect the ultimate end—the public good and general welfare—were capable, under general terms, of constitutional specification; but the subordinate means were so numerous, and capable of such infinite variation, as to render an enumeration impracticable, and they must therefore be left to necessary implication.

The Tenth Amendment did not take from Congress the power to incorporate the bank. For the implied powers were as much delegated as

<sup>1</sup> Lawrence, in *Annals*, 1st Cong., ii., p. 1915.

<sup>2</sup> Hamilton's opinion cited, p. 221.



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the express powers. The power of creating a corporation might as well be implied as any other thing, as an instrument or means for carrying into execution any of the specified powers. A corporation might be created in relation to the collection of taxes, or to the trade with foreign countries, or to the trade between the States, or with the Indian tribes, because it was incidental to the general sovereign or legislative powers to regulate a thing to employ all the means which related to its regulation, to the best and greatest advantage.<sup>1</sup> Mr. Gerry, pursuing a similar argument, reminded Mr. Madison that the latter, at the time the amendments were pending, had disavowed the opinion that only express powers were delegated to Congress. Gerry contended, therefore, that by a fair and candid application of established rules of construction the bill was authorized.<sup>2</sup>

The arguments for and against a liberal construction of the implied powers of Congress were thus thoroughly and profoundly gone into during the discussion over the bill, and the large majority of more than two thirds of the total membership of both Houses of Congress, by the passage of the bill, affirmed their belief in the broader interpretation. By the passage of the bill, this body of men, familiar with the proceedings of the

<sup>1</sup> Hamilton's Opinion, pp. 184 and 185.

<sup>2</sup> In Annals, 1st Cong., ii., pp. 1951, 1947.

Philadelphia and the State conventions, approved the doctrine that under the power to regulate commerce, Congress was authorized to create corporations to effect the regulation, and to invest those corporations with monopolistic privileges.

## CHAPTER XI

### THE NON-IMPORTATION AND EMBARGO MEASURES OF WASHINGTON'S SECOND ADMINIS- TRATION

AS we have seen, in the period between the close of the Revolutionary War and the assembling of the Philadelphia Convention, proposals had often been made to invest the central government with power to restrict and even to prohibit foreign commerce, for the purpose of retaliating upon other nations for wrongs inflicted upon our trade, and of encouraging domestic industries. The unfavorable situation of the foreign relations of the country during the administrations of Washington, Adams, Jefferson, and Madison, together with the increased power of the central government to enforce such measures, greatly increased the favor extended to such proposals, and led, in each of those administrations, to measures directed to the enforcement of various prohibitions and restrictions, some of which affected interstate as well as foreign commerce. The consideration of the restrictive measures of Adams's and Madison's administrations,

however, is complicated by their connection with the imminence and the actual outbreak of foreign wars,—in the one case with France, in the other with England; so that the ordinances of these administrations throw less light upon the peace powers of Congress than do those of the administrations of Washington and Jefferson; and I shall therefore confine my examination of non-intercourse and embargo measures to those enacted in the administrations of the two last-named presidents.

The policy of restriction included measures of two kinds: (1) the prohibition of the importation of foreign commodities and of the entry of foreign vessels into our ports; and (2) embargoes upon commerce. They illustrate, upon a grand scale and in a drastic manner, the application of the commercial power of Congress to the attainment of great national ends, through restrictions placed upon various branches of trade, and extending even to total prohibition; and in so far as the precedents furnished by them are authoritative, they indicate the unsoundness of the view that the power of Congress to regulate commerce is restricted to the passing of measures to advance it, but stops short of the power to prohibit it. For the history of those times and the explicit statements of men who were prominently connected with the advocacy and enforcement of the measures show that they were aimed at righting

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wrongs suffered by the United States, with respect to such varied matters as the retention of the western posts by the British, impressment of American seamen, and the promotion of domestic trades and industries. Under Washington the embargo was at first applied only to foreign commerce, but was afterwards extended to reach interstate trade. Under Jefferson, the first embargo act affected certain branches of interstate trade, and subsequent laws so increased the restraints imposed on both foreign and interstate traffic, over land as well as by water, that Jefferson described Congress as bidding "agriculture, commerce, and navigation to bow before the complete enforcement of the embargo, to be nothing when in competition with that."<sup>1</sup>

### *Non-Importation in Washington's Administration*

The retention by the British of the western posts, their Orders in Council injurious to our trade, their insistence upon the right of impressing seamen from American vessels, intensely irritated the country and prepared the way for retaliatory measures. Jefferson was Washington's Secretary of State, and thoroughly informed as to the unsatisfactory condition of negotiations for the righting of our wrongs. His sympathy with France increased his antagonism to Great Britain,

<sup>1</sup> *Writings of Gallatin* (Adams), i., p. 385.

and he originated the movement toward a retaliatory policy by his "Report to Congress on the Privileges and Restrictions on the Commerce of the United States in Foreign Countries," of December 16, 1793,<sup>1</sup> in which he set forth the existing condition of the laws and practice of various foreign nations with respect to American commerce, and advocated the adoption by the United States of a retaliatory system of discriminating duties and prohibitions.

From the standpoint of constitutional law, this report indicated Jefferson's approval of the principle that foreign commerce could be burdened in the interest of the international relations of the country, and of domestic trades and industries. For, of course, the discriminating duties which he advocated would not directly promote the commerce upon which they would be laid—would, in fact, directly obstruct it, in greater or less degree. But this obstruction was considered by Jefferson authorized under the Constitution, for the sake of the advantages to other national interests resulting from the duties. Among those advantages, were, as I have noticed, the encouragement to domestic industries; Jefferson supporting his advocacy of the duties by the suggestion, that they would have the effect of indirect encouragement to domestic manufactures of the same kind, and might induce the foreign

<sup>1</sup> *Writings of Thomas Jefferson* (Ford), vi., p. 470.

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manufacturer to come himself into these States. In this encouragement of manufactures he thought the States might co-operate with the general government, by opening the resources of encouragement which were under their control, extending them liberally to artists in those particular branches of manufacture for which their soil, climate, population, and other circumstances were suited, and by fostering the precious efforts and progress of household manufacture by some patronage suited to the nature of its objects, guided by the local information they possess, and guarded against abuse by their presence and attentions. "The oppressions on our agriculture in foreign ports," he said, "would thus be made the occasion of relieving it from a dependence on the councils and conduct of others, and of promoting arts, manufactures, and population at home."

Attempts have been made to distinguish between the power to impose restrictions and embargoes upon foreign and upon interstate commerce, the former power being admitted, the latter denied; but the distinction is not supported by the text of the Constitution, nor by the decisions of the Supreme Court; and, as we shall see more clearly in the chapter which considers the embargo laws of Jefferson's administration, it was not recognized by him. For he resorted to embargoes upon interstate as well as upon foreign commerce,

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to secure certain great public benefits, and particularly the relief of our foreign trade from the burdens placed upon it by England and France. Jefferson's report, therefore, presented but one side of a general power of Congress, of which later, when President, he was to exhibit another side.

His report was made the basis of Madison's resolutions of January 3, 1794,<sup>1</sup> recommending higher duties and reciprocal restrictions against nations having no commercial treaties with us. The first resolution relating to higher duties was passed. The consideration of the others was postponed; and meantime, news coming of the Orders in Council of November, 1793, the more drastic policy of the embargo was entered upon. On April 7, 1794, however, resolutions suspending all commercial intercourse with Great Britain were introduced into the House of Representatives,<sup>2</sup> and a bill was carried by a large majority,<sup>3</sup> which prohibited the importation of all articles of British or Irish production after November 15, 1794. It failed in the Senate by the casting vote of the Vice-President, that body preferring, in deference to Washington's wishes, to await the result of Jay's mission, which had then been decided upon.<sup>4</sup> The defeat of the

<sup>1</sup> Annals, 3d Cong., p. 155 (1849).

<sup>2</sup> *Ibid.*, p. 561.

<sup>3</sup> *Ibid.*, pp. 602, 605.

<sup>4</sup> Madison to Jefferson, Apr. 28, 1794, and to James Madison, May 4, 1794, in *Writings of Madison* (Hunt), vol. vi., pp. 211, 215.



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bill in that body, therefore, has no bearing upon any constitutional questions connected with it.

The terms of the resolutions, however, again indicated very clearly the connection of the power to regulate commerce with the promotion of other national purposes, which we have seen exemplified in previous measures. For they prohibited all commercial intercourse between the citizens of the United States and the subjects of the King of Great Britain, so far as the same respected articles of the growth or manufacture of Great Britain and Ireland, until Great Britain should cause restitution to be made for losses or damages sustained by citizens of the United States, from armed vessels, or any person, acting under commission or authority of the King of Great Britain, in violation of rights of neutrality; and until she should surrender all posts held and detained by the King of Great Britain within the territories of the United States.<sup>1</sup>

The resolutions and the bill aroused earnest debate, in which, however, no objection was made upon the ground that they were not supported by the commerce clause of the Constitution, because prohibition was not regulation. And this silence is strongly persuasive of the prevalence of a belief among the public men of that day, that the power of prohibiting, as well as of restricting, foreign commerce, at least, was pos-

<sup>1</sup> *Annals, 3d Cong.*, p. 561.

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sessed by Congress. Other constitutional objections were raised against the resolutions; that, for example, the Constitution declared that the President, under certain conditions, should be the organ to treat exclusively with foreign powers, but the resolution prescribed, in effect, the terms of a treaty, and was therefore beyond the powers of Congress.<sup>1</sup> That this constitutional objection was raised, but that based upon prohibition not being regulation was not, is again strongly indicative that the latter objection was not considered of weight, if it was thought of.

### *The Embargo Measures of Washington's Administration*

The British Orders in Council of November 16, 1793, directed British cruisers to detain all ships laden with goods the produce of any French colony, and also all ships carrying supplies for the use of any such colony. The enforcement of the orders seriously interfered with the American carrying trade, and a number of American vessels were seized. When the orders became known in the United States much excitement arose over them,<sup>2</sup> in consequence of which a joint resolution laying an embargo for thirty days was passed

<sup>1</sup> This objection was made by Sedgwick and by Dexter, *Annals*, 3d Cong., pp. 570, 589, 590.

<sup>2</sup> Washington to Lear in *Writings of Washington* (Ford), xii., 424.

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by both Houses of Congress on March 26, 1794,<sup>1</sup> and received the approval of Washington. On the 31st of the same month a resolution passed both Houses for carrying the embargo into more complete effect, which was also approved by Washington.<sup>2</sup> In the same month also, a committee was appointed in the House of Representatives to bring in a bill for continuing and regulating embargoes,<sup>3</sup> their report resulting in the law of June 4, 1794. On April 17, 1794, a resolution continuing the embargo until May 25th of that year, and safeguarding treaty rights, passed the House of Representatives by a large majority, and having been amended in the Senate in respects which did not affect the constitutional principle involved, was concurred in by that body.<sup>4</sup>

The joint resolution of March 26th extended, in terms, only to foreign commerce. But the resolution of March 31, 1794, enlarged the embargo so that it also affected interstate commerce. For it provided that, during the continuance of the embargo, no registered vessel having on board goods, wares, or merchandise should be allowed to depart from one port of the United States to any other port in the same, except upon bond given, with sureties in the sum of double the value of vessel and cargo, that the goods,

<sup>1</sup> Annals, 3d Cong., pp. 530, 531.

<sup>2</sup> *Ibid.*, pp. 556, 79.

<sup>3</sup> *Ibid.*, pp. 531, 114. The law is in Annals, p. 1450.

<sup>4</sup> *Ibid.*, pp. 598, 600; 84.

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wares, or merchandise should be relanded in some part of the United States. And it is noteworthy, that this enlargement was suggested by Washington in his message to Congress of March 28, 1794,<sup>1</sup> in which he directed attention to the possibility of evasions of the embargo by clearances from one district to another.

The law of June 4, 1794, to which reference has been made, is a precedent for another constitutional principle, which has been much debated in recent years—viz.: that Congress can lawfully delegate to the executive, the performance of certain functions respecting the enforcement of legislative measures. For it authorized the President, whenever in his opinion the public safety might require, to lay an embargo on all ships and vessels of the United States, or within its ports, under such regulations as the circumstances of the case might require, and to continue or revoke the same; and the President was also authorized to give all such orders to the officers of the United States as might be necessary to carry the measure into operation. It was, however, provided that no embargo could be laid by the President while Congress was in session, and that any embargo laid by him should cease and determine fifteen days from the actual meeting of Congress next after the laying of the same.<sup>2</sup>

<sup>1</sup> *Writings of Washington* (Sparks), xii., p. 102.

<sup>2</sup> *Annals*, 3d Cong., p. 1450.

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The debates over the embargo measures of Washington's administration are silent as to the constitutional objections arising from the prohibition of commerce, and this silence is again persuasive of the existence of a general opinion in that day, that Congress had the power to prohibit commerce, as an incident to its authority to regulate it. It is, at least, probable that if any general objection to the prohibitory power were then entertained, it would have found expression in the debates. That the objection was not expressed is strong evidence that it was not entertained; and we know that such measures were approved by Washington, Jefferson, and Madison, and that their enactment under Washington was held to be a powerful precedent for the embargo laws of Jefferson's time. Consideration of all the circumstances, therefore, justifies the conclusion that, during Washington's administration, when a large number of members of Congress were thoroughly conversant with the views of the Constitution entertained in the federal and the several state conventions, a general opinion affirmed the power of Congress to utilize the regulation of commerce for the attainment of various national ends, not in themselves necessarily constituting commercial regulation, and to extend this utilization even to the prohibition of one branch or another of trade.

## CHAPTER XII

### THE NON-IMPORTATION AND EMBARGO LAWS OF JEFFERSON'S SECOND ADMINISTRATION

JEFFERSON'S career is affected with a certain irony. The chief advocate, and perhaps the author, of the strict construction theory of the Constitution, and the founder of the party which has ever since professed to be devoted to the defence of that theory, it was his fortune to enter wilfully upon, and to support to the end of his long life the propriety of, one of the greatest extensions of the powers of the central government under the Constitution which has been made by any President, at least in time of peace. I refer to his non-importation and embargo measures, which were among the important enactments of his second administration.

The non-importation and embargo ordinances of Washington's time were precursors of these measures; and more forceful precedents were also furnished by the law of March 2, 1807, forbidding the importation of slaves after January 1, 1808,<sup>1</sup> and by the acts of February 28, 1806, and

<sup>1</sup> *Annals*, 9th Cong., 2d Session, p. 1266. (Ed., 1852.)

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February 24, 1807, suspending all commercial intercourse between the United States and certain parts of the island of St. Domingo.<sup>1</sup> The similarity of these measures, in principle, to the non-importation and embargo laws of Jefferson's time was perceived at the time; and as no objection appears to have been made to them upon constitutional grounds, they were regarded, and properly, as strong precedents to support the constitutionality of the embargo laws.

### *The Non-Importation Law*

Decisions of the British Admiralty adverse to neutrals, in 1805, the impressment of American seamen, and the injuries to the neutral commerce of the United States, were brought to the attention of Congress by Jefferson's annual message of December 3, 1805,<sup>2</sup> and his special message of January 17, 1806<sup>3</sup>; and on January 29, 1806, a resolution was introduced into the House of Representatives by Gregg, of Pennsylvania, which, as amended, provided that until Great Britain should make equitable and satisfactory arrange-

<sup>1</sup> Annals, 9th Cong., 1st Session, p. 1228; 2d Session, p. 1262. The territorial limits of the restriction and the duration of the act were extended by the law of February 24, 1807. Annals, 9th Cong., 2d Session, p. 1262.

<sup>2</sup> A draft of this message is in Ford's *Writings of Jefferson*, vol. viii., p. 384.

<sup>3</sup> *Writings of Jefferson* (Ford), vol. viii., p. 416.

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ments concerning impressment and also seizures of goods and vessels, no goods, wares, or merchandise of the growth, produce, or manufacture of Great Britain, or any of the colonies or dependencies thereof, ought to be imported into the United States after November 15, 1806. The resolution also provided that whenever satisfactory arrangements should be made, the President might, by proclamation, fix a day on which the prohibition should cease.<sup>1</sup>

The fear arising that Gregg's resolution might result in reducing the revenues, and in preventing the importation of goods which were indispensable to the welfare of the country, Nicholson introduced a resolution limiting the prohibition against importation to such goods as we could produce for ourselves, or obtain from other countries than Great Britain.<sup>2</sup> The change from Gregg's to Nicholson's resolution did not, of course, affect any constitutional principle, the two resolutions being identical in this respect; and the strong public approval of the restrictive policy at that date is indicated by the passage of Nicholson's resolution in the House of Representatives by 87 votes in favor to 35 against it,<sup>3</sup> and by the passage in the same body of the law of April 18, 1806, which gave effect to the resolution,

<sup>1</sup> Annals, 9th Cong., 1st Session, p. 413.

<sup>2</sup> *Ibid.*, p. 451.

<sup>3</sup> *Ibid.*, p. 823.



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by 93 votes in its favor to 32 against; while in the Senate the bill was approved by 19 votes in its favor to 9 against it.<sup>1</sup> Thus, by a majority of almost three to one, the Congress of 1806 supported the policy of a strict-construction President in favor of prohibiting certain branches of trade. The operation of the law of April 18, 1806, was suspended until July 1, 1807, by the act of December 19, 1806, which also authorized the President to further suspend it, but not beyond the second Monday in December, 1807.<sup>2</sup> This act, therefore, repeated the delegation to the President of certain functions in connection with the carrying out of legislative policies, which we have seen Congress exercising in connection with the embargo measures of Washington's second administration, and this feature of the

<sup>1</sup> Annals, 9th Cong., 1st Session, pp. 877, 240. The text of the law is in Annals, p. 1259. It provided among other things, that after November 15, 1806, it should not be lawful to import into the United States or the territories thereof, from any port or place situated in Great Britain or Ireland, or in any of the colonies or dependencies of Great Britain, any goods, wares, or merchandise of the description of articles enumerated in the act; nor should it be lawful to import into the United States, or the territories thereof, from any foreign port or place any of the above mentioned goods, wares, merchandise; and the act contained a proviso in favor of goods imported from beyond the Cape of Good Hope within the period of fifteen months. By the Embargo Repeal Law of March 1, 1809, this act was repealed to take effect after May 20, 1809.

<sup>2</sup> Annals, 9th Cong., 2d Session, p. 1249.

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law seems to have excited no constitutional objection at this time.

Events occurring in Great Britain and France soon, however, resulted in a determination upon the part of Jefferson's administration and supporters in Congress to enter upon the more drastic policy of embargo, in connection with which arguments for and against the prohibitory powers of Congress were greatly developed.

### *The Embargo Measures of Jefferson's Administration*

The proclamations, Orders in Council, and decrees of England and France in 1806 and 1807 had so harassed the trade of the United States with Europe and European colonies, as to reduce it nearly to the condition in which it would have been had England and France declared war upon the United States.\*

These injuries and the capture of the *Chesapeake* by the *Leopard* produced so great irritation in the United States, that Jefferson's annual message of October, 1807, and his special message on commercial depredations, of December 18, 1807, were followed by speedy action in Congress. A bill was reported in the Senate laying an embargo

\* So said by John Quincy Adams, in his address: "To the Citizens of the United States," written after his presidency. Henry Adams, *New England Federalism*, 1800-1815, p. 187.

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on December 18th, passed under suspension of the rules on the same day, by 22 votes in favor to 6 against, sent to the House of Representatives, which passed the bill with some amendments by 82 votes in favor to 44 against, and the amendments being concurred in by the Senate, the bill became a law, with Jefferson's approval, December 22, 1807.<sup>1</sup>

The act affected interstate as well as foreign commerce. For it was among other things provided, that during its continuance no registered or sea-letter vessel, having on board goods, wares, or merchandise, should be allowed to depart from one port to another of the United States, without the giving of a bond with sureties to the collector of the district, that the cargo should be relanded in some other port of the United States, dangers of the sea excepted.

The application of the embargo measures to interstate trade was further insured by certain provisions of the law of January 9, 1808,<sup>2</sup> and the policy of the embargo was further extended in March of the same year, to explicitly reach small unlicensed vessels, and transportation by land. For the law of March 12th<sup>3</sup> made it unlawful to export from the United States, in any manner whatever, any goods, wares, or merchandise of

<sup>1</sup> Annals, 10th Cong., 1st Session, ii., p. 2814.

<sup>2</sup> *Ibid.*, p. 2815.

<sup>3</sup> *Ibid.*, p. 2839.

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foreign or domestic manufacture, and further provided that if during the continuance of the acts of December 22, 1807 and January 9, 1808, any goods, wares, or merchandise were exported from the United States, either by land or water, the vessel, boat, raft, cart, wagon, or sleigh, or other carriage in which the same should have been exported, should, together with the tackle, apparel, horses, mules, or oxen, be forfeited, and the owner or owners of the goods, wares, or merchandise, and every other person knowingly concerned in such exportation should be fined.

Oppressive and almost tyrannous as such a measure then did and now would seem, it was supported by the dominant sentiment in Congress, for the bill was passed in the House of Representatives by the great majority of 97 votes in its favor to 22 opposed.<sup>1</sup>

But even this measure did not satisfy the President. Doubtless the great Congressional majority behind him emboldened Jefferson to go to great lengths in carrying his policy through, and he determined to put a stop to the evasions of the embargo, even if in so doing he had to create monopolies in necessities of life, and treat trade in certain food-supplies as so inherently suspicious that it might not be permitted to be carried on between one port and another, even in the same State. Jefferson entertained no

<sup>1</sup> *Annals*, 10th Cong., 1st Session, ii., p. 1712.

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doubts of the constitutional power of Congress to enact the necessary measures, although they laid heavy burdens upon interstate trade, and by land, and even seriously hindered trade wholly within a single State. He was bent upon securing great national ends, to which all lesser considerations must yield, and probably no more forcible statement of the extent of the power of the central government to accomplish such purposes, by the temporary arrest or destruction of branches of trade, has ever been made than by Jefferson in his suggestions to Gallatin at this time.

The leading object of the legislature was, and ours in execution of it ought to be [he writes], to give complete effect to the embargo laws. They have bidden agriculture, commerce, navigation to bow before that object, to be nothing when in competition with that. Finding all their endeavors at general rules to be evaded, they finally gave us the power of detention as the panacea, and I am clear we ought to use it freely, that we may, by fair experiment, know the power of this great weapon, the embargo. Therefore, to propositions to carry flour or other provisions into the Chesapeake, the Delaware, the Hudson, and other exporting places, we should say boldly it is not wanted there for consumption, and the carrying it there is too suspicious to be permitted.<sup>1</sup>

Jefferson was, as he writes, suspicious of pro-

<sup>1</sup> Adams, *Writings of Gallatin*, i., p. 385.

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visions, and particularly of flour. He determined to put an end to evasions of the embargo, through the shipping of this commodity out of the country from places along Lake Champlain, from East Port, Maine, and parts of Georgia; and eventually so far gave effect to his animosity against this necessary of life, as to prevent the shipping of it into certain States of the Union from other States, until his restrictions broke down.<sup>1</sup> In his effort to attain his purpose, however, he did not hesitate to create local monopolies in the commodity, by authorizing the governors of States to give certificates in favor of particular merchants directed to the collectors of the ports from which flour was exported, and on which certificates those merchants would be permitted to bring in such quantities of flour as were named in the certificates.<sup>2</sup>

The urgency of Jefferson transmitted to Congress through Gallatin, who drafted the bill, led to the passage of the "Act of April 25, 1808, in addition to the act laying the Embargo."<sup>3</sup> This law, even more explicitly than its predecessors, extended the embargo to interstate commerce by land as well as by water, and to articles of domestic

<sup>1</sup> Schouler's *History U. S.*, ii., pp. 179, 180.

<sup>2</sup> Adams, *Writings of Gallatin*, i., p. 384. The monopolistic character of this measure was noted by Gallatin at the time. See, also, *Writings of Jefferson* (Washington), v., p. 286.

<sup>3</sup> *Annals*, 10th Cong., 1st Session, ii., p. 2870.

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growth and manufacture. It empowered collectors to seize deposits of commodities on land, apparently merely upon the ground of suspicions of the collectors arising out of the unusual character of the deposits, without direct proof of any unlawful intent or act upon the part of the depositor. It also provided that no vessel of any description whatever, or wherever bound, whose employment was confined to bays, sounds, rivers, and lakes, in the jurisdiction of the United States (excepting packets, ferry-boats, and vessels exempted from giving any bonds whatever) should be allowed to depart, without having received a clearance and furnishing a manifest of her whole cargo, nor unless her lading was under the direction of revenue officers. It further provided, that, during the continuance of the embargo, no vessel having any cargo whatever on board should be allowed to depart from any port of the United States for any other port or district of the United States adjacent to the territory of any colony or province of a foreign nation, nor should any clearance be furnished to any such vessel without the special permission of the President. The act authorized the commanders of public armed vessels to stop any vessel, flat, or boat belonging to any citizen of the United States, either on the high seas, or within the jurisdiction of the United States. It gave authority to collectors to detain any vessel ostensibly

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bound with a cargo to some other port of the United States, whenever in the collector's opinion the intention was to violate the embargo law.

But even this measure did not satisfy Jefferson who, disregarding the rising wrath of the New England States, procured the passage of the "Embargo Force Act," of January 9, 1809.<sup>1</sup> In this law Jefferson's restrictive policy reached its zenith, and that it was generally approved by members of Congress is indicated by its passage in the Senate by 20 votes for the bill to 7 against, and in the House of Representatives by 71 votes affirmative to 32 negative votes.<sup>2</sup> That these great majorities represented a settled opinion in favor of the policy is shown by the defeat of Hillhouse's motion for repeal of the embargo in the Senate, by 25 to 6,<sup>3</sup> and by the approval in the House of Representatives of the report of Campbell's committee in favor of prohibiting the admission into this country of the goods, wares, or merchandise of belligerent powers which violated the rights of neutrals, and the entrance of the ships of such powers into our ports by 84 to 30.<sup>4</sup>

The Force Act extended prohibitions and

<sup>1</sup> Annals, 10th Cong., 2d Session, p. 1798.

<sup>2</sup> *Ibid.*, pp. 298, 1024.

<sup>3</sup> *Ibid.*, p. 230.

<sup>4</sup> *Ibid.*, p. 894. Resolution, pp. 520, 521.



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penalties to land transportation and land vehicles, and forbade all vessels whatever from taking on board any specie or merchandise without a permit from the collector, and unless the lading were under the inspection of proper revenue officers, and a bond were given, in six times the value of the vessel and cargo, that the vessel would not leave without a clearance and would not proceed to any foreign port or place, nor put any article upon another vessel bound thither. It authorized collectors to take into their custody the specie and other cargoes of vessels, when there was any reason, in the judgment of the collector, to believe these were intended for exportation, or when they were in vessels, carts, wagons, sleighs, or in any manner apparently on their way toward the territory of a foreign nation, or to a place whence such articles were intended to be exported; and when taken in custody the articles were to be permitted to be removed only on the giving of a bond for the delivery of the same in some place in the United States, whence in the opinion of the collector there would be no danger of their being exported.

But the rising opposition of merchants and ship-owners in the seaboard States defeated the President's policy, and in less than two months after the passage of the Force Act, Jefferson was compelled by fears of dismemberment

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of the Union,<sup>1</sup> to approve the so-called "Embargo Repeal Act" of March 1, 1809,<sup>2</sup> by which the embargo acts were repealed except as to England and France, and the President was empowered to suspend the embargo as to either of them, upon their ceasing to violate the rights of neutrals. This act, however, did not effect an entire repeal of the embargo, and it expressly interdicted the entrance of the harbors and waters of the United States to all ships or vessels flying the flag of England or France, after May 20, 1809, and forbade the importation after that date of any goods, wares, or merchandise whatever from any port or place in Great Britain, Ireland, or the colonies or dependencies of Great Britain, from any port or place in France, or her colonies or possessions, and from any place in the actual possession of England or France. But by supporters and opponents alike of the embargo, this act of March 1, 1809, was considered the downfall of the President's policy, and its passage was celebrated by public rejoicings among his adversaries.

<sup>1</sup> Jefferson to Dearborne, July 16, 1810, *Works* (Washington edition), vol. v., p. 529; to Giles, December 25, 1825, *Works*, vol. vii., p. 425; Ford's edition, vol. x., p. 350. Pickering had advised that a convention of delegates be called to consider the reserved rights of the States, and determine how far the States might judge for themselves as to infractions of the Constitution by the embargo measures, and interpose a negative. Adams, *New England Federalism*, p. 378.

<sup>2</sup> Annals, 10th Cong., 2d Session, p. 1824.

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Surveying the several laws down through the Force Act of January 9, 1809, it is clear that they were correctly represented by Jefferson's opponents at the time, as extending to interstate commerce, and Hillhouse was justified, in his speech against the Force Act, in considering it as reaching the whole commerce and intercourse between the different States,<sup>1</sup> although he exaggerated the terrors arising from the acts of tyrannous collectors. Upon whatever grounds the embargo measures may be defended, they cannot be supported as laying burdens only upon foreign, not upon interstate commerce, and that Jefferson clearly understood this is proved by his letter to Gallatin of May 6, 1808, quoted above. But it was inevitable that laws which inflicted such injuries upon the trade or commerce of a section of the country as the embargo acts inflicted upon New England, should be opposed by every argument that the injured could conjure. And so, in the embargo controversy, as in probably every other serious debate over a measure during our history, the constitutional objection was produced, although late in the day, and under unfavorable circumstances, by the Federalists, who had been supporters of the restrictive measures of Washington's time. The localities which they represented had but recently demanded retaliatory measures against England and France,

<sup>1</sup> *Annals*, 10th Cong., 2d Session, pp. 287, 288.

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and it was generally understood that such measures would include the embargo. The Federalists, therefore, were now in the position of men who resorted, not from deep conviction, but from economic expediency, to a constitutional principle which they had not before admitted, but had implicitly denied. Coming from the Federalists of 1808-1809, the constitutional argument against the embargo was not a reason, but an excuse—it was, as it were, dragged in by the heels. As the embargo policy persisted from 1807 to 1809, however, the constitutional, as well as the economic, arguments against it were greatly developed. The constitutional argument indeed, both against and for the embargo, was more thoroughly worked out in the debates on several of the embargo bills, than ever since. Not even in the recent debates in Congress and the public press, over the constitutionality of laws dealing with the regulation of the interstate business of railroads and other corporations, has the power of Congress to lay prohibitions on commerce, foreign and interstate, been so thoroughly explored as in Congress, the courts, and the public press from 1807 to 1809.

All of the arguments with which we have recently been made familiar were developed in that earlier debate. It was insisted, for example, that prohibition was not regulation; Jefferson's opponents, indeed, saying his measures annihilated ✓

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commerce, and annihilation was not regulation, and the argument was enforced by this ingenious analogy: "But, Mr. Speaker, supposing you should hand your watch to a proper artisan, in order to have it regulated, and he should dash it to pieces in your presence, would you call this regulating it? I believe not."<sup>1</sup> It was also objected that certain of the bills reached commerce between two ports in the same State, which commerce could not be regulated by Congress. It was also insisted that the embargo violated the provision of the Constitution, which forbids the giving of ✓ preferences to the ports of one State over those of another.<sup>2</sup> As to certain powers entrusted to the President in connection with the enforcement and suspension of the embargo, it was objected that the granting of these amounted to a delega- ✓ tion of legislative powers to the Executive, in violation of the Constitution.<sup>3</sup>

For the measures, on the other hand, it was pointed out, that their principle had been recognized as sound in Washington's administration, and in the passage of the laws prohibiting importation of slaves, and trade with St. Domingo. That Congress lacked power to lay prohibitions was therefore characterized as a discovery of an

<sup>1</sup> Annals, 10th Cong., 2d Session, p. 870 *et seq.*  
same, pp. 1005, 1006.

<sup>2</sup> Annals, 10th Cong., 2d Session, p. 288 *et seq.*

<sup>3</sup> *Ibid.*, 1st Session, pp. 2144, 2233.

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extraordinary nature made during that session of Congress.<sup>1</sup> In support of the embargo it was also urged that it was authorized by the clause granting power to Congress to regulate commerce. "This power included every possible commercial legislative power that was not expressly excepted," and the making of certain specified exceptions in the Constitution demonstrated that every part of the power which was not excepted was granted.<sup>2</sup> When general powers are delegated, it was said, if any exceptions thereto are intended, they are expressly made in that instrument. Without such exceptions, the general powers delegated are considered unrestricted. Whence is derived the power to prohibit the migration or importation of slaves from Africa? From the power to regulate commerce with foreign nations.

This general power . . . to regulate commerce must include power to determine to what nation, on what terms, and to what extent we will permit it to be carried on; without this power, the power to regulate commerce would be altogether nugatory. . . . If you have the power to restrict your trade in any degree you have the like power to restrict it to the full extent of an entire prohibition both of exports and imports.<sup>3</sup>

With respect to the objection that the giving

<sup>1</sup> Annals, 10th Cong., 1st Session, p. 2145.

<sup>2</sup> *Ibid.*, p. 2225.

<sup>3</sup> *Ibid.*, p. 2147.

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to the President of authority to suspend the embargo and perform other acts in connection with it was an unconstitutional delegation of legislative powers to the Executive, the argument often since repeated, in and out of court, was made, that Congress had delegated no legislative power to the President; that the legislative act had been performed by the legislature in the passage of the law; that the carrying of the law into effect was all that was left to the President, under conditions prescribed in the law.<sup>1</sup> Precedents were quoted from laws of 1794 and 1799, for authorizing the President to suspend the embargo under conditions prescribed in the laws, and it was said by a leading Federalist, that the objection that Congress could not give to the President power to suspend the embargo was "a new dogma, contrary to the old canons, received both of faith and practice by every political sect which has had power ever since the adoption of the Constitution."<sup>2</sup>

Before the passage of the Force Act, the earlier embargo laws came into court, where their constitutionality was sustained by John Davis, District Judge of the district of Massachusetts; and this summary of the arguments of 1807 to 1809 may properly close with an extract from his opinion. For Davis was himself a contem-

<sup>1</sup> Annals, 10th Cong., 1st Session, pp. 2084, 2085, 2142.

<sup>2</sup> Josiah Quincy, in Annals, 10th Cong., 1st Session, p. 2200.

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porary of and participant in the debates which had preceded the ratification of the Constitution, and was personally familiar with the working of the government under that instrument. He had been a member of the Massachusetts State Convention, which ratified the Constitution, was afterward appointed a United States district attorney by Washington, and was made a United States judge by Adams, in 1801. The constitutionality of the embargo laws was raised before him in 1808, in the case of the United States *vs.* the Brigantine *William*.<sup>1</sup> The question particularly considered was whether the power to regulate commerce under the Constitution included authority to impose restrictions and prohibitions upon that commerce. It was contended by counsel for the vessel that it did not; while the representatives of the government argued that the power to regulate included the power to prohibit, at least to the extent exercised by the laws then before the court. Judge Davis agreed with the latter view, stating his argument with a clearness and breadth of insight, perhaps not inferior to Chief Justice Marshall's in *M'Culloch vs. the State of Maryland* and *Gibbons vs. Ogden*.

It will be admitted [he said] that partial prohibitions are authorized by the expression; and how shall the degree, or extent of the prohibition be ad-

<sup>1</sup> 2 Hall's *Law Journal*, p. 255.



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justed, but by the discretion of the national government, to whom the subject appears to be committed. . . . Further; the power to regulate commerce is not to be confined to the adoption of measures, exclusively beneficial to commerce itself, or tending to its advantage; but, in our national system, as in all modern sovereignties, it is also to be considered as an instrument for other purposes of general policy and interest. The mode of its management is a consideration of great delicacy and importance; but the national right, or power, under the Constitution, to adapt regulations of commerce to other purposes, than the mere advancement of commerce, appears to me unquestionable. . . . The situation of the United States, in ordinary times, might render legislative interferences, relative to commerce, less necessary; but the capacity and power of managing and directing it, for the advancement of great national purposes, seems an important ingredient of sovereignty.

It was perceived, that, under the power to regulate commerce, Congress would be authorized to abridge it, in favor of the great principles of humanity and justice. Hence the introduction of a clause, in the Constitution, so framed as to interdict a prohibition of the slave trade, until 1808. Massachusetts and New York proposed a stipulation—to prevent the erection of commercial companies, with exclusive advantages. Virginia and North Carolina suggested an amendment that “no navigation law or law regulating commerce should be passed without the consent of two thirds of the members present in

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both Houses." These proposed amendments were not adopted, but they manifest the public conception, at the time of the extent of the powers of Congress relative to commerce.

That, notwithstanding the objections urged against the power of Congress to enact embargoes, the large majority of members of Congress approved of the laws, is indicated by the great majorities in both Houses by which they were passed. That Washington approved of embargoes we know. That to the end of his long life Jefferson regarded the embargo measures as constitutional, and among his most important policies, is made plain by his references to them in his old age.<sup>1</sup> And we are also assured that Madison, throughout his life, believed the embargo was constitutional. In 1794 he moved the restrictive resolution which aimed to give effect to Jefferson's report. In 1795 he defended his course in his "Political Observations," in which he attributed great virtue to the embargo, and wrote as follows of the power of prohibition in the new government compared with the lack of it in the Confederation:

Under the old Confederation, the United States had not the power over commerce; of that situation she [Great Britain] took advantage. The new government, which contained the power, did not

<sup>1</sup> See his letters to Giles and Dearborn cited above.

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evinced the will to exert it; of that situation she still took advantage. Should she yield, then, at the present juncture, the problem ought not to be solved without presuming her to be satisfied by what has lately passed—that the United States has now not only the power but the will to exert it.<sup>1</sup>

And his letter to George Joy, of September, 1834, written in his extreme age, shows that even until then, he doubted neither the constitutionality nor the value of the embargo.<sup>2</sup>

It is, therefore, a reasonable conclusion from our survey, that contemporaries of the formation and ratification of the Constitution quite generally believed, that under the power to regulate commerce, Congress had authority to prohibit, at least for limited periods, both interstate and foreign commerce; and the general prevalence of this opinion enabled Jefferson, the strict-constructionist, to carry his measures through Congress.

The history of the country has now been examined as far as the plan of this essay contemplated it should be. The historical inquiry is fortunately freed from a certain verbal narrowness

<sup>1</sup> *Works of Madison*, vol. iv., p. 500 (Ed., 1865).

<sup>2</sup> *Ibid.*, p. 360. John Quincy Adams had acquiesced in Jefferson's embargo, and when President, in 1826, approved of total interdiction of trade with all the British Colonies both in the West Indies and in North America. *Memoirs of John Quincy Adams*, vii., p. 213 (1879).

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and dryness, which perhaps necessarily attaches to constitutional interpretation. For the historical inquiry is concerned with facts and their large significance. It necessarily considers nations and their institutions as organisms, not primarily as subjects of dialectical discussion. To the historian, however it may be to the interpreter of a constitutional text, the history of the United States, in the formation and practical application of the Constitution, is an example of the development of a living organism, not a subject of technical verbal discussion. And the historical study brings out the practical view which the men who made the Constitution took of their work. They regarded their labors primarily as the formulating of institutions to attain practical ends of government. This purpose, and not the interpretation of the written document, was that about which they felt themselves chiefly concerned. They produced the document, and its interpretation must be for us, to a considerable degree, an exploration of the meaning of words. But for them the production of that document was primarily the making of a government intended to practically operate. The necessity out of which the instrument grew was a practical necessity. Certain needs had become plain to them before 1787, and they set out to satisfy them; and through the chain of circumstances, which has been examined, it came about, that the men who framed the

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instrument were mostly those who favored a powerful central government, because they believed no other would satisfy their needs. This opinion of theirs, that large powers in a central body were needed, was particularly true of the power over commerce. Proceeding from the regulation of foreign commerce only, they were soon forced to consider also the regulation of commerce between the States, and, as a matter of considerable interest at that time, the regulation also of commerce with the Indian tribes. The necessities of the years preceding 1787 had forced the conviction upon them that the regulation of all branches of commerce was practically one, and that it was necessary to place the regulation of all within the central authority. They, therefore, in the same clause of the Constitution, and in the same terms, conferred upon the central government the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes; and the examination which I have made of their proceedings and debates through the Constitutional Convention and the administrations of Washington and Jefferson, indicates that they intended to bestow upon the central government equal powers over the several branches of trade, except as they imposed restrictions upon the power to regulate foreign commerce.

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But the interpretation of a law or a constitution is not to be determined solely by ascertaining the opinions of members of legislatures by which the constitution or the law is enacted, or of the community at the time of the enactment. For it may happen that the terms of the instrument preclude an interpretation in harmony with such opinions. It may be, that from one cause or another, the instrument as enacted, fails to give effect to the opinions of such members or communities. Therefore, the inquiry which has been made here is not the equivalent of an essay in constitutional interpretation. It is simply a study of the state of facts and opinions out of which the Constitution arose; and to complete it there remains the comparison of the results of that study with the principles settled by the leading decisions of the Supreme Court relating to the commercial power of Congress. This comparison will be made in the next chapter, with which this essay will conclude.

## CHAPTER XIII

### THE RESULTS OF THE HISTORICAL INQUIRY AND THE DECISIONS OF THE SUPREME COURT— THE DECISIONS OF THE COURT GENERALLY CONFIRM THE CONCLUSIONS OF THE HIS- TORICAL INVESTIGATION

THE powers assigned by contemporary opinion to Congress under the commerce clause of the Constitution are, in general, those which the Supreme Court has determined that body possesses. The agreement between the decisions of the Court and the conclusions of the historical inquiry is exhibited in judgments of the Court in cases which have considered: (1) the extent of the commercial power of Congress; (2) the equality of its authority over interstate and foreign trade; (3) its power to erect corporations as agencies to carry on various branches or incidents of commerce; (4) its power to construct or authorize the construction of highways of interstate commerce; (5) its power to lay duties upon imports for the purpose of protecting domestic industries; and (6) its power to restrict and prohibit various branches of commerce in the interest of great national purposes.

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### 1. *The Extent of the Commercial Power*

The extent of the authority of Congress under any of the specially delegated powers depends upon the extent and nature of the implied powers; and before the commerce clause was considered in the Supreme Court the nature and scope of these had been determined in the case of *M'Culloch vs. The State of Maryland*,<sup>1</sup> decided in 1819, in an opinion by Chief Justice Marshall. The case arose over the right of the State of Maryland to tax the Bank of the United States, and as presented to the Court, raised, among other questions, that of the nature and extent of the implied powers of Congress, under the necessary and proper clause of the Constitution. Marshall settled these powers upon a very broad basis, and his determination has never been shaken. His view of their extent is made evident in the following extracts from his opinion:

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will

<sup>1</sup> 4 Wheaton, U. S., 316.



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probably continue to arise, as long as our system shall exist.

If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all, its powers are delegated by all; it represents all, and acts for all. . . . But this question is not left to mere reason; the people have, in express terms, decided it, by saying, "this Constitution, and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land," and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding. . . ." There is no phrase in the instrument which, like the Articles of Federation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the Tenth Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor

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prohibited to the States, are reserved to the States or to the people"; thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument.

Marshall considered and negatived the contention of the State of Maryland, that the words "necessary and proper," in the general clause of the Constitution, limited the power of Congress to the passing of only such laws for the execution of the granted powers as were indispensable, and without which the power would be nugatory. He devoted an elaborate analysis to ascertaining the meaning of "necessary and proper," and concluded that these words left to the national legislature a wide discretion.

We admit [he said], as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not

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prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

The extent of the implied powers having been thus settled, the way was cleared for the discussion of the extent of the power of Congress over commerce, when the first case under the commerce clause reached the Court, in 1824.<sup>1</sup> This presented primarily the question of the right of the State of New York to grant certain monopolistic privileges for the use of steam as the motive power of vessels over the waters and bays of that State. In the opinions of the Court, however, and in the arguments of counsel, the broader questions of the power of Congress over commerce, interstate as well as foreign, and of the relation of the powers of the States to the authority of the national legislature, were treated at length, and Marshall's opinion has become the foundation of the law relating to the commercial power of Congress. After determining that the power included navigation, Marshall thus explained and defined its nature and extent:

It is the power to regulate; that is to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain

<sup>1</sup> *Gibbons vs. Ogden*, 9 Wheaton, 1.

terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

2. *Equality of the Power over Interstate and over Foreign Commerce*

It was clearly Marshall's opinion, that the power of Congress over interstate was at least as great as its power over foreign commerce. "It has been said," he remarks, "that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain in-

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telligible cause which alters it." Justice Johnson, an appointee and follower of President Jefferson, in his concurring opinion, asserted that the power of Congress was co-extensive with that which previously existed in the States and, further explaining his meaning, he said:

The States were, unquestionably, supreme; and each possessed that power over commerce, which is acknowledged to reside in every sovereign State. The definition and limits of that power are to be sought among the features of international law; and, as it was not only admitted, but insisted on by both parties, in argument, that, "unaffected by a state of war, by treaties, or by municipal regulations all commerce among independent States was legitimate," there is no necessity to appeal to the oracles of the *jus commune* for the correctness of that doctrine. The law of nations, regarding man as a social animal, pronounces all commerce legitimate in a state of peace until prohibited by positive law. The power of a sovereign State over commerce, therefore, amounts to nothing more than a power to limit, and restrain it at pleasure. And since the power to prescribe the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive, it can reside but in one potentate, and hence the grant of this power carries with it the whole subject, leaving nothing for the State to act upon.

Although there have been occasional remarks

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in later decisions of the Supreme Court indicating that there might be a difference between the extent of the power of Congress over interstate and over foreign commerce, yet the greatly preponderating weight of authority in that Court favors the proposition that the former is at least co-extensive with the latter, and this remark is particularly true of the Court's recent decisions. For its great judgments during the last twenty years, as in the Northern Securities case,<sup>1</sup> *United States vs. Joint Traffic Association*,<sup>2</sup> *United States vs. Trans-Missouri Freight Association*,<sup>3</sup> *United States vs. Delaware & Hudson Co.*,<sup>4</sup> necessarily imply the equality of the power to regulate interstate and foreign trade. Indeed, these decisions could not have been rendered, had the Court been of the opinion, that the power of Congress to regulate interstate was less than its power to regulate foreign commerce. The preponderating view of the Court is indicated in the following quotation from the majority opinion in *Bowman vs. Chicago, etc., Railway Company*<sup>5</sup>: "The power conferred upon Congress to regulate commerce among the States is indeed contained in the same clause of the Constitution which

<sup>1</sup> *Northern Securities Co. vs. United States*, 193 U. S., 197.

<sup>2</sup> *United States vs. Joint Traffic Association*, 171 U. S., 505.

<sup>3</sup> 166 U. S., 290.

<sup>4</sup> 213 U. S., 366.

<sup>5</sup> *Bowman vs. Chicago & Northwestern Ry. Co.*, 125 U. S., 465, (482).

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confers upon it power to regulate commerce with foreign nations. The grant is conceived in the same terms, and the two powers are undoubtedly of the same class and character and equally extensive."

Analogous to the question whether the authority of Congress over interstate and foreign commerce is equal, is that of the existence of a "Borderland," in the field of commercial regulation, into which neither the power of the States nor of Congress extends. In recent years it has frequently been contended by opponents of laws enacted by Congress directed to the control of corporations doing interstate business, that the States have been deprived of all power of regulating interstate commerce by the adoption of the Constitution, but that the power of the central government to positively regulate that commerce is limited by an assumed purpose of the framers of the Constitution, or by something in the nature of the government created by that instrument, although that something is not expressed. This theory, however, is without historical justification; the men who framed the Constitution believed that they were conferring upon the central government that complete power over the several branches of commerce which the States then possessed, except as they placed in the Constitution certain express limitations upon that power, most of which relate only to foreign

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commerce. Justice Johnson correctly stated the intention of the Constitutional Convention in the quotation which has been made from his opinion in *Gibbons vs. Ogden*. Nor has this theory found any favor with the Supreme Court. It was urged upon the Court in the case of *Addyston Pipe & Steel Co. vs. United States*,<sup>1</sup> and the Court thus disposed of it:

Assuming, for the purpose of the argument, that the contract in question herein does directly and substantially operate as a restraint upon and as a regulation of interstate commerce, it is yet insisted by the appellants at the threshold of the inquiry, that by the true construction of the Constitution the power of Congress to regulate interstate commerce is limited to its protection from acts of interference by State legislation, or by means of regulations made under the authority of the State by some political subdivision thereof, including also Congressional power over common carriers, elevator, gas and water companies, for reasons stated to be peculiar to such carriers and companies, but that it does not include the general power to interfere with or prohibit private contracts between citizens, even though such contracts have interstate commerce for their object, and result in a direct and substantial obstruction to or regulation of that commerce.

This argument is founded upon the assertion that the reason for vesting in Congress the power to regulate commerce was to insure uniformity of

<sup>1</sup> 175 U. S., 226 *et seq.*



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regulation against conflicting and discriminating State legislation; and the further assertion that the Constitution guarantees liberty of private contract to the citizen at least upon commercial subjects, and to that extent the guarantee operates as a limitation on the power of Congress to regulate commerce. Some remarks are quoted from the opinions of Chief Justice Marshall . . . and from the opinions of other justices of this Court . . . all of the effect that the object of vesting in Congress the power to regulate interstate commerce was to insure uniformity of regulation against conflicting and discriminating State legislation. The further remark is quoted from *Railroad Co. vs. Richmond* that the power of Congress to regulate commerce was never intended to be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such commerce. It is added that the proof herein shows that the contract in this case was not so designed.

It is undoubtedly true that among the reasons, if not the strongest reason, for placing the power in Congress to regulate interstate commerce, was that which is stated in the extracts from the opinions of the Court in the cases above stated.

The reasons which may have caused the framers of the Constitution to repose the power to regulate interstate commerce in Congress do not, however, affect or limit the extent of the power itself.

In *Gibbons vs. Ogden*, *supra*, the power was declared to be complete in itself, and to acknowledge

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no limitations other than are prescribed by the Constitution.

Under this grant of power to Congress, that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations, where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate, to any substantial extent interstate commerce. . . . We do not assent to the correctness of the proposition that the constitutional guarantee of liberty to the individual to enter private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned.

The power of Congress [said the Court, *in re Rahrer*<sup>1</sup>] to regulate commerce among the several States, when the subjects of that power are national in their nature is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints. The cases show [said the Court in the Lottery Cases<sup>2</sup>] that commerce among the States embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph. They also show that the power to regulate commerce among the several States is vested in Congress as absolutely as it would be in a single government, having in its Constitution the

<sup>1</sup> 140 U. S., p. 555.

<sup>2</sup> 188 U. S., 352 *et seq.*

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same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject only to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and that in determining the character of the regulations to be adopted Congress has a large discretion, which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed.

There is perhaps no express decision of the Court, to the effect that the power of Congress to regulate traffic by land is coextensive with its power to regulate traffic by water, and it has sometimes been denied, in recent years, that they are equal. That, however, they are coextensive, is necessarily implied in a great body of recent decisions of that Court, and particularly in those relating to the extent of the control by Congress over interstate railroads. Several decisions, which have already been referred to, involve the principle that the power of Congress to regulate commerce by land is coextensive with its power to regulate commerce on the high seas or inland waters, and this doctrine is very clearly presented in *in re Debs*,<sup>1</sup> in which the Court considered particularly the power of Congress to regulate traffic by land, and recited a large number of Acts

<sup>1</sup> 158 U. S., 564.

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in which Congress had exercised the power. Further reference to this topic will be made in connection with the decisions of the Court bearing upon the power of Congress to construct or authorize the construction of highways of interstate commerce.

### 3. *The Power of Congress to Erect Corporations*

The power of Congress to erect corporations, as an incident of its power to regulate commerce, as well as of other powers, was settled in 1819, in the case of *M'Culloch vs. State of Maryland*<sup>1</sup> cited above, in which Marshall reasoned as follows:

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. . . . The power of creating a corporation though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. . . . The

<sup>1</sup> 4 Wheat., 316 (410, *et seq.*).

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power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the Constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the government of the United States, or in any department thereof." After the most deliberate consideration it is the unanimous and decided opinion of this Court, that the act to incorporate the Bank of the United States is a law made in pursuance of the Constitution and is a part of the supreme law of the land.

In *Luxton vs. North River Bridge Co.*<sup>1</sup> the Court having before it the right of Congress to incorporate a Bridge Company for interstate trade, citing with approval *M'Culloch vs. Maryland*, and other decisions, said: "Congress therefore may create corporations as appropriate means of executing the powers of government, as for instance a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting

<sup>1</sup> 153 U. S., 529.

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commerce among the States." And the doctrine was applied to sustain the Act of Congress of July 4, 1884 (23 Stat. 73, ch. 179) granting a right of way through the Indian Territory to the Southern Kansas Railway Company, the Official Reporter correctly summarizing the doctrine of the case in the syllabus of *Luxton vs. North River Bridge Co.* as follows: "In the execution of the power to regulate commerce Congress may employ, as instrumentalities, corporations created by it or by the States."

### 4. *The Power of Congress to Construct or to Authorize the Construction of Highways of Interstate Commerce*

The development of opinion in the Supreme Court, respecting the power of Congress to construct highways of interstate commerce seems to have followed the same course as it did in the country at large. It would appear that, in Marshall's time, the Court approved of the existence of the power; at least it is difficult to reconcile the sweeping terms of Marshall's judgments with the doctrine that Congress lacked this power. After his time a doubt seems to have arisen in the minds of the Justices whether Congress possessed the power; but after the Civil War, and the change which that produced in public opinion respecting the relation of the

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central government to the States, the Supreme Court rendered a number of judgments, which determined that Congress has the power to construct the highways, and even without the consent of the States in which they lie.

Thus, in the case of *California vs. Pacific Railroad Company*, in 1888,<sup>1</sup> the Court said of the laws under which the Central Pacific Railroad and other roads were constructed:

It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. This power in former times was exerted to a very limited extent, the Cumberland or National Road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has

<sup>1</sup> 127 U. S., p. 1.

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plenary power over the whole subject. Of course the authority of Congress over the Territories of the United States and its power to grant franchises exercisable therein, are and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of State as well as Federal corporations.

In the case of *Cherokee Nation vs. Kansas Railway Company*,<sup>1</sup> the Court affirmed the authority of Congress to vest railway and other companies with the power of eminent domain, adequate to the taking of lands within the States, for the purpose of constructing interstate highways, without the consent of the States.

The fact [said the Court] that the Cherokee Nation holds these lands in fee simple under patents from the United States, is of no consequence in the present discussion; for the United States may exercise the right of eminent domain even within the limits of the several States, for purposes necessary to the execution of the powers granted to the general government by the Constitution. Such an authority, as was said in *Kohl vs. United States*, 91 U.S., 367, is essential to the independent existence and perpetuity of the United States, and is not dependent upon the consent of the States. . . . The lands in the Cherokee territory, like the lands held by private owners

<sup>1</sup> 135 U. S., 641.



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everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it; provided only, that they are not taken without just compensation being made to the owner.

The Congress of the United States [said the Court in *Luxton vs. North River Company*<sup>1</sup>] being empowered by the Constitution to regulate commerce among the several States, and to pass all laws necessary or proper for carrying into execution any of the powers specifically conferred, may make use of any appropriate means for this end. . . . Congress, therefore, may create corporations as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States or a railroad corporation for the purpose of promoting commerce among the States. . . . And whenever it becomes necessary for the accomplishment of any object within the authority of Congress, to exercise the right of eminent domain and take private lands, making just compensation to the owners, Congress may do this, with or without a concurrent Act of the States in which the lands lie.

### 5.    *The Power of Congress to Lay Protective Duties on Imports*

The power of Congress to lay duties upon imports, for the purpose of protecting domestic trades

<sup>1</sup> 153 U. S., 529, 530.

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and industries, has rather been implied by the Supreme Court than expressly decided. The power indeed has been treated by the Court as so well established that it did not require affirmation. Several of the decisions of the Court, however, have necessarily involved the doctrine that Congress possesses the power; as, for example, the decisions of the court in *Cross vs. Harrison*, 16 How. U. S., 164; *Downes vs. Bidwell*, 182 U. S., 244; *Dooley vs. United States*, 183 U. S., 151; *De Lima vs. Bidwell*, 182 U. S., 1. How clearly the Court understands that Congress possesses the power to levy protective duties, appears in the following extract from its opinion in the case of *Buttfield vs. Stranahan*.<sup>1</sup>

The power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution. . . . Whatever difference of opinion, if any, may have existed, or does exist concerning the limitations of the power resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but indirectly as a necessary result of provisions contained in tariff legislation.

<sup>1</sup> 192 U. S., 492, 493.

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### 6. *The Power of Congress to Restrict and Prohibit Interstate and Foreign Commerce*

Although the power of Congress to restrict and prohibit interstate and foreign commerce has been denied, from time to time, during a century by commercial interests which have been injured by the exercise of the power, yet, for nearly an equal length of time, the Supreme Court has affirmed its existence, and recent decisions have established it firmly in the law of commerce.

In *Gibbons vs. Ogden*<sup>1</sup> the *obiter dicta* of Chief Justice Marshall affirmed the authority of Congress to lay embargoes as follows:

The universally acknowledged power of the government to impose embargoes must also be considered as showing that all America is united in that construction which comprehends navigation in the word commerce. Gentlemen have said in argument, that this is a branch of the war-making power, and that an embargo is an instrument of war, not a regulation of trade. . . . But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such case, an embargo is no more a war measure than a merchantman is a ship of war, because both are vessels which navigate the ocean with sails and seamen.

When Congress imposed that embargo which, for a time, engaged the attention of every man in the

<sup>1</sup> 9 Wheat., 191, *et seq.*

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United States, the avowed object of the law was, the protection of commerce and the avoiding of war. By its friends and its enemies it was treated as a commercial, not as a war measure.

Congress may [said the court in the "Legal Tender Cases"<sup>1</sup>] relieve parties from their apparent obligations indirectly in a multitude of ways. It may declare war, or even in peace, pass non-intercourse acts, or direct an embargo. All such measures may, and must operate seriously upon existing contracts, and may not merely hinder, but relieve the parties to such contracts entirely from performance. It is, then, clear that the powers of Congress may be exerted, though the effect of such exertion may be in one case to annul, and in other cases to impair the obligations of contracts. . . . An embargo suspends many contracts and renders performance of others impossible, yet the power to enforce it has been declared constitutional. [The court citing *Gibbons vs. Ogden*, 9 Wheat, 1.] The power to enact a law directing an embargo is one of the auxiliary powers, existing only because appropriate in time of peace to regulate commerce or appropriate to carrying on war. Though not conferred as a substantive power, it has not been thought to be in conflict with the Constitution because it impairs indirectly the obligation of contracts. That discovery calls for a new reading of the Constitution.

In the Lottery Cases<sup>2</sup> the Court expressly

<sup>1</sup> 12 Wall, U. S., 550.

<sup>2</sup> 188 U. S., 355, *et seq.*

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decided that Congress had the power to prohibit certain forms of interstate commerce, among them the carriage of lottery tickets from State to State. The Court held that, under its plenary power to regulate interstate commerce Congress, in the interest of public morals, and for the protection of the people of all the States, might devise such means as would drive the traffic of lottery tickets out of commerce among the States.

In this connection [the Court said] it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution. What provision in that instrument can be regarded as limiting the exercise of the power granted? What clause can be cited which, in any degree, countenances the suggestion that one may, of right, carry or cause to be carried from one State to another that which will harm the public morals? We cannot think of any clause of that instrument that could possibly be invoked by those who assert their right to send lottery tickets from State to State except the one providing that no person shall be deprived of his liberty without due process of law. But surely it will not be said to be a part of any one's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will confessedly be injurious to the public morals.

If it be said that the Act of 1895 is inconsistent with the Tenth Amendment, reserving to the States

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respectively or to the people the powers not delegated to the United States, the answer is that the power to regulate commerce among the States has been expressly delegated to Congress.

In *United States vs. Delaware & Hudson Co.*,<sup>1</sup> the Court decided that the power of Congress to regulate commerce included authority to prohibit a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities, when (a) the article or commodity had been manufactured, mined or produced by a carrier or under its authority; and at the time of transportation the carrier had not in good faith, before the act of transportation, disassociated itself from such article or commodity; (b) when the carrier owned the article or commodity in whole or in part; (c) when the carrier, at the time of transportation had an interest, direct or indirect in a legal or equitable sense, in the article or commodity, not including articles or commodities manufactured, mined, produced, or owned, etc., by a *bona fide* corporation in which the railroad company was a stockholder.

In reaching its conclusions the Court said (pages 405, 406):

Let it be conceded at once that the power to regulate commerce possessed by Congress is in the nature

<sup>1</sup> *United States vs. Delaware & Hudson Co.*, 213 U.S., 415, *et seq.*

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of things ever enduring, and therefore the right to exert it at all times in its narrow and all times in its plenitude must remain, free from restrictions and limitations arising or asserted to arise from or by State laws, whether enacted before or after Congress has chosen to exert and apply its lawful power to regulate.

The foregoing quotations from the decisions of the Supreme Court thus indicate that under each of the six heads which I have considered, and under which are included practically all of the topics concerning which the powers of Congress have been disputed in recent years, the Court has affirmed as law the views which the historical inquiry shows were entertained by the men who drafted the Constitution and conducted the new government in its early years. Marshall was himself a man of the constitutional period, efficient in procuring the ratification of that instrument by Virginia, a member of one of the early Congresses, and experienced in the administration of various departments of the government. He arrived at his great decisions with the aid of his knowledge of contemporary opinion and of the needs of the government. He thus opened up that mode of constitutional interpretation which embodied the opinions of contemporaries of the formation of the Constitution into our fundamental law. The road thus opened was followed by his successors. Perhaps it would be more correct to say

that Marshall extended the road which Hamilton opened. For the author of those fundamental principles of American constitutional law is neither Marshall nor Webster, but Alexander Hamilton. Marshall's orderly and comprehensive intellect adopted the principles which the creative genius of Hamilton had first formulated. With these principles, Marshall, as I have said, extended the road of constitutional interpretation, which his successors in the Supreme Court have followed; and through him the views of the contemporaries of the Constitution, as profoundly formulated by Hamilton, have become a part, for good or for ill, of the constitutional law of the United States.





## APPENDIX NO. I

### THE POWER OF CONGRESS TO CONSTRUCT OR AUTHORIZE THE CONSTRUCTION OF INTERNAL IMPROVEMENTS

THE suggestion in the body of this essay, that the leaders in the constitutional movement of 1787 intended to vest Congress with power to construct, and authorize the construction of highways of interstate commerce, accords with the principle settled by several decisions of the Supreme Court since the Civil War, that Congress possesses such power under the Constitution, as an incident of its control over commerce between the States. Several publications have, however, recently denied the existence of such a power; and have particularly denied that the history of the country in the years immediately preceding the adoption of the Constitution justifies the conclusion that the framers of that instrument intended to bestow such power on that body. It is, therefore, proper to state somewhat at length the reasons upon which my opinion is based. To them is added a summary of the opinions of later generations to the year 1860, as the same are to be gathered from the messages of the Presidents. The opinions of the Presidents have been selected as the most available and the most authoritative examples of the views of

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large numbers of the people at the dates of the several messages. For they have generally been heads of their parties, representing, upon all hotly debated questions, the average opinion of great masses of men. In their messages may be traced, perhaps more clearly than in any equal number of other documents, the history of opinion in the United States upon constitutional questions; and this, of the power of Congress over internal improvements, is one which has sometimes greatly divided the people. The messages of the Presidents respecting it have provided party platforms and have greatly influenced the development of popular opinion respecting the Constitution. If, therefore, we can accurately ascertain the views of successive Presidents we shall be able to trace quite correctly the development of opinion upon this question. I have closed my examination with the messages of President Buchanan, because after him came the Civil War, and the great change which it produced in public thinking concerning the relation of the States to the Union. The views of no President after Buchanan can essentially add to or detract from the reasonableness of any earlier interpretation of the powers of the national government under the Constitution. For another reason, also, it was unnecessary to pursue the inquiry beyond Buchanan's administration. After him, and after the Rebellion, came the successive decisions of the United States Supreme Court, which have taken the question out of the region of debate, and definitely settled it in favor of the larger power of Congress.

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Since the adoption of the Constitution, the power has been referred to different clauses of that instrument. Thus by Calhoun, in 1817, it seems to have been based rather on the authority to lay and collect taxes, duties, imposts and excises, to pay the debts, and provide for the public defence and general welfare of the United States, than on that of regulating commerce<sup>1</sup>; while Mr. Bayard, in 1807, and Mr. Webster, in 1830, referred it to the latter power.<sup>2</sup> But waiving consideration of the particular clause of the Constitution by which the power may be supported, and considering the broader historical question: Did the founders of the Republic intend to vest such a power in the general government under any provision of the Constitution?—the facts upon the whole, strongly support the conclusion that they did so intend, probably, however, under certain restrictions which will be hereafter noticed.

From the formation of the Confederation, in 1781, to the end of the second administration of President Monroe, in 1825, the ideas expressed by public men upon this power of Congress develop with a certain consistency, which divides this term of years into two periods, the first ending approximately with the year 1800, the second terminating with Monroe's second administration. After Monroe, however, the opinions of one President are so diverse from those of another, that I have been able to reduce them to

<sup>1</sup> *Works* of John C. Calhoun (Crallé), vol. ii., p. 192 *et seq.*

<sup>2</sup> As to Bayard, Elliot's *Debates*, vol. iv., p. 265 (*Opinions*, Ed. 1830); as to Webster, *Works* of Daniel Webster, vol. iii., p. 296 (edition 1890).

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no consistent general principles, and shall therefore consider them simply one by one.

### *The First Period: 1781-1800*

I have found no document or statement of this period which expressly affirms, or expressly denies, an intention to vest the central government with power to improve the highways of interstate commerce by land or by water. But the events of this epoch, as a whole, support the conclusion that the men who were active in bringing about the change of government intended to bestow such a power upon Congress.

The rapid development of the West, and the problems thereby presented to the Confederacy, were intently occupying men's thoughts in the years immediately preceding the Philadelphia Convention. The development of means of communication with the Western settlements was considered of the greatest importance, as well for political as for commercial reasons; the permanent retention of the West in the Union was, in fact, thought to depend upon the development of such communications. Contemporaneously with this Western growth other events were producing a general demand for the vesting in Congress of larger powers over commerce, interstate as well as foreign, and the development of the West was considered to be so related to the movement to enlarge the commercial powers, that the rapid growth of that region was urged by Madison and Monroe as a reason for haste in vesting Congress with the larger authority.

But the Western settlements were so far from the Eastern communities, that different parts of the proposed highways lay in different States, and portions of them in territory over which the Confederation alone had jurisdiction. Therefore no State was singly adequate to making the highways, nor was any combination of States adequate; without the consent and co-operation of the Confederation they could not be made.

When, therefore, Washington, Monroe, Madison, and others advocated the construction of highways of interstate commerce as helpful to attach the Western territory to the Union, and urged timely action on the commercial proposals because the relation of that region to the Confederacy made such action necessary, they must have reflected that the complete power over commerce which they wished to vest in Congress would be connected with the making of the highways of that commerce. Even at that time, the making of the highways must have been performed partly by the Confederacy or under its authority. For the jurisdiction of no State included the whole of any highway; and the leaders of that date were firmly set upon a great enlargement of the commercial powers of Congress, and upon a fundamental change in the relation of the powers of the States to those of the Confederacy. The conclusion seems to be forced by the survey of the history of the country between 1781 and 1787, that the men of that time intended to vest this power in the central government, without which their aims could not be effected, nor their fears allayed. As respects Wash-

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ington, this inference accords better than the opposite with the whole tenor of his public life and way of thinking on public questions. It is impossible, I think, to read the documents from which extracts have been given in Chapter IV., and come to the opposite conclusion concerning his views. With respect to other leaders of that day, this inference better accords than does its opposite with the circumstances of those times, and with their contemporary utterances, several of which were quoted in that chapter. And among those who probably favored vesting Congress with this power, I include the Monroe of 1785, notwithstanding his partial denial of such opinions more than thirty years later. For unless Monroe was mentally more obtuse than anything in his career indicates that he was, then, when, in 1784 and 1785, he, on the one hand, favored the development of trade routes with the West, and on the other hand urged the bestowal upon Congress of the sole and exclusive power of regulating commerce, as well interstate as foreign, he could not have failed to reflect, that the exercise of the power by Congress would be related to the development of the routes. Surely, when he recited the volume of the Western trade in his Report, and urged the approaching accession to the Union of Western States as a reason for quickly bestowing upon Congress the complete power over commerce which he then advocated, he was aware that the exercise of the commercial power and the development of the routes would be necessarily connected; nor can I believe he was then averse to vesting Congress, which was

alone adequate to the construction of the routes, with authority to construct them, without which the power to regulate commerce must have been largely ineffective. We cannot appeal to the Monroe of 1822 from the Monroe of 1785. For his opinions in 1785 were the result of contemporary observations, not affected by party considerations. But his views of 1822 were those of a party leader, necessarily committed to a party doctrine, to which advocacy of power in Congress to construct highways of interstate commerce was opposed. Not only the inevitable dulling of the convictions of 1785 through the lapse of years, but the stress of party politics takes from the opinions of Monroe, the President, much of their weight when opposed to the words of Monroe, the member of the Continental Congress. It is not, however, certain, that there was any direct opposition between Monroe's opinions at the several dates in question. As President, he admitted the constitutional power of Congress to aid the construction of public improvements, and approved numerous bills to that end; what he was chiefly opposed to, was the assertion by the general government of ownership in and jurisdiction over the land.

But enough as to Monroe. The circumstances which immediately led to the calling of the Annapolis Convention support the conclusion that the delegates to that assembly favored the bestowal of this power upon Congress.

Among those circumstances, as we have seen, was the joint effort of Maryland and Virginia to improve lines of communication with the West. But those



lines entered or affected other States also, and therefore Maryland and Virginia sought the co-operation of Delaware and Pennsylvania, and thus furnished an example of several States co-operating in the construction of roads, which neither alone was adequate to make. And as I have above pointed out, their aims could not be attained without the consent and co-operation of the Confederacy as a whole. It is not probable that such an example of the inadequacy of a single State, and of the increased capacity of a number of States, and of the Confederacy, to carry through improvements affecting interstate commerce should have been entirely ignored; it is not probable that the commissioners to Annapolis forgot that one of the objects out of which their convention grew was the providing of highways of interstate trade; and I cannot doubt that had they completed the business of their appointment, the larger powers of Congress recommended by them would have been framed to include authority to construct highways of interstate trade, at least with the consent of the States within which the improvements lay.

In the proceedings of the Constitutional Convention there is nothing which clearly shows the opinions of its members upon the power of Congress to construct highways of interstate commerce. For as is pointed out above,<sup>1</sup> the adverse vote of the Convention, on September 14, 1787, upon the proposition to empower Congress to cut canals is to be explained on other grounds than on the opposition of the Convention to vest Congress with this power. In the early years

<sup>1</sup> See Chapter viii.

of the new government, however, there is a little which bears upon and supports the conclusion here contended for. Thus, in 1790, John Jay, a distinguished lawyer, one of the authors of *The Federalist*, and at the time Chief Justice of the United States, writes to Washington, with respect to the power of Congress, under the post-roads clause of the Constitution, that the "power would be nugatory unless it (implied) a power either to repair these roads themselves, or to compel others to do it. The former seems to be the more natural construction."<sup>1</sup> In 1796, Madison offered a resolution, and supported a bill drawn pursuant thereto, authorizing the President to cause surveys to be made of a post-road from Maine to Georgia<sup>2</sup>; and remarks in the debate, as well as the text of the bill, show that the surveys were preliminary to work of actual construction, to be undertaken by the central government. Mr. Baldwin, for example, stated, that it was properly the business of the general government to undertake improvements of the roads; for the different States were incompetent to the business, their different designs clashing with each other. It was enough, he thought, for the States to make good roads to the different seaports; the roads crossing them should be left to the government of the whole.<sup>3</sup>

At this time, also, Jefferson seems to have had no definite constitutional scruples against the exercise

<sup>1</sup> *Correspondence and Public Papers of John Jay*, edited by Henry P. Johnston (1891), vol. iii., p. 407.

<sup>2</sup> *Annals of 4th Congress*, 1st Session, 297, 314, 1406, 1415.

<sup>3</sup> Elliot, *Debates*, vol. iv.; *Opinions*, 244 (edition 1830).

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of the power by Congress. His objections to Madison's proposal are, that it is "the entering wedge of enormous expenditures, boundless patronage by the executive, a bottomless abyss of public money." He only suggests the question, without insisting on the answer, whether the power to establish post-roads means the power to make the roads, or only to select among those already made.<sup>1</sup> His subsequent approval of bills relating to the Cumberland Road indicates that neither this query nor any other consideration induced him to deny the power of Congress to authorize the construction of highways of interstate commerce, until after the close of his Presidency.

In the first period, I find no suggestion that the power to construct the highways should be exercised only with the consent of the States within which they lay. But the inference from this silence, that the power of Congress to construct such improvements without the consent, and even against the wishes of the respective States, was then favored, would be unreasonable. It is more probable that the strong contemporary desire for such improvements made the question whether the assent of the States affected should be first obtained merely an abstract one—it never occurring to anybody, that a State would object to the prosecution by the central government of so desirable a work; and the serious practical consequences of the construction of public improvements within a State, but without its consent, not yet presenting themselves to men's minds.

<sup>1</sup> *Writings of Thomas Jefferson* (Ford), vol. vii., p. 63.

*The Second Period : 1800 to 1825*

In this period the question of the power of Congress to construct highways of interstate commerce, without the consent of the States within which they lie, is distinctly raised, and usually, though not always, answered in the negative.

But in the first part of this second period insistence upon the principle that works of internal improvement must receive the assent of the States affected by them, does not seem to have changed the former opinion, that the power to undertake, or to authorize, them was vested in Congress; it only coupled with the exercise of the power the condition that a given work should be undertaken only with the consent of the State affected. Perhaps the first assertion of this principle is found in the Acts of 1802 and 1803, relating to roads from the Atlantic seaboard to the Ohio River, and both approved by Jefferson. Under the first of the acts the State of Ohio was admitted into the Union, and provision was made for applying part of the proceeds of the sale of the public lands to the laying out and making of roads "leading from the navigable waters emptying into the Atlantic, to the Ohio, to the said States, and through the same"; such roads to be laid out under the authority of Congress, and with the consent of the several States through which they passed.<sup>1</sup> The second Act, passed March 3, 1803, in modification of the preceding act, provided that the Secretary of the Treasury should pay from time to time three per cent.

<sup>1</sup> Annals 7th Congress, 1st Session, 1351.

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of the net proceeds of lands sold by the United States, pursuant to the Act of 1802, to such persons as might be authorized by the Legislature of the State, to be applied to the laying out, opening and making of roads within the State.<sup>1</sup>

That the majority of the House of Representatives at this date approved of the constitutional power of Congress to construct highways of interstate commerce, is further indicated by the passage in December, 1805, of Mr. Jackson's resolution providing for the appointment of a committee to prepare a bill making provision for the application of certain money theretofore appropriated to the laying out and making of certain public roads.<sup>2</sup>

This power of Congress is also implied by the terms of the law authorizing the construction of the celebrated Cumberland Road, approved by Jefferson in 1806.<sup>3</sup>

By this act the President was authorized and directed to appoint commissioners to lay out a road from Cumberland, or a point on the northern bank of the Potomac, in the State of Maryland, to the State of Ohio. The act specified the width of the road, the manner of marking its margins, etc., and authorized the President, after obtaining the consent of the State or States through which the road was located, to take prompt and effective measures for its construction.

Jefferson's signature to the bill implies his approval of the doctrine that Congress had power to construct

<sup>1</sup> Annals 7th Congress, 2d Session, 1588.

<sup>2</sup> Annals 9th Congress, 1st Session, 276.

<sup>3</sup> Annals 9th Congress, 1st Session, 1236 *et seq.*

internal improvements, at least after the consent of the States within which they lay had been obtained, and his writings prior to 1808 indicated no change of opinion. In 1806 he signs the Cumberland Road Bill, and writes Gallatin concerning the road in terms which show he favored the project, and then felt no constitutional objection to it.<sup>1</sup>

In his annual message of this year, as in that of 1808, he enlarges upon the advantages to the country of applying the revenue from imposts to public education, roads, rivers, canals, and such other objects, as it may be thought proper to add to the constitutional enumeration of federal powers. It is not clearly stated in either message that he thought a constitutional amendment necessary to give to Congress the power to construct internal improvements, and the context of both indicates that his suggestion of possible need of an amendment refers rather to the educational and other proposals than to internal improvements. But if he is referring to the last, and if Gallatin's report of 1808 correctly represents Jefferson's views, he considered an amendment necessary only to enable Congress to undertake such works without the consent of the States, not necessary to undertake them after receiving the consent of the States. For Gallatin says in his report, that, under the Constitution, the United States could not open any road or canal without the consent of the State through which such road or

<sup>1</sup> *Writings of Jefferson* (Ford), vol. viii., p. 466; Adams, *Writing of Gallatin*, vol. ii., 305, 309; *Jefferson* (Ford), vol. viii., p. 494; ix., p. 224.

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canal must pass. "In order, therefore, to remove every impediment to a national plan of internal improvements an amendment to the Constitution was suggested by the Executive, when the subject was recommended to Congress. Until that be obtained, the assent of the States being necessary for such improvements, the modifications under which this assent may be given, will necessarily control the manner of applying the money.<sup>1</sup>

Gallatin's report presented a most comprehensive scheme of internal improvements under the four heads, of (1) a great canal from north to south along the Atlantic coast; (2) communications between the Atlantic and western waters; (3) communication between the Atlantic waters and the great Lakes and River St. Lawrence; (4) interior canals. He estimated the total cost at \$20,000,000, and expressed no doubt of general constitutional power to construct, asserting only the necessity of first obtaining the consent of the States within which the several works would be performed.

The bills, reports, and other documents bearing upon the power of Congress to construct internal improvements in the period from Madison's resolves of 1796 to Gallatin's report of 1808, therefore confirm the view heretofore expressed, that the men of the constitutional era intended to vest Congress with such power, probably, however, with the proviso that the States in which the works lay should consent

<sup>1</sup> An excellent summary of Gallatin's plans is contained in Henry Adams's *Life of Albert Gallatin*, p. 351.

to the undertakings; and this conclusion is further supported by numerous appropriations for such works between the passage of the Cumberland Road Bill and Madison's veto of the Bonus Bill in 1817; Mr. Hulbert, in his book, *The Cumberland Road*, noting seven bills appropriating money to that enterprise alone during these years, all of which were approved by President Madison.<sup>1</sup>

But by 1817, Madison seems to have changed his mind, and for a time to have held the opinion that Congress lacked the power to construct internal improvements, even after obtaining the consent of the States affected thereby.

"The Bonus Bill," which he vetoed near the end of his Presidency, set apart and pledged certain funds "for constructing roads and canals, and improving the navigation of water courses, in order to facilitate, promote and give security to internal commerce among the several States, and to render more easy and less expensive the means and provisions for the common defense." Madison vetoed it upon the ground that the power to construct such works was not granted by the Constitution. He does not make it clear whether he construed "construction" as implying the assertion of jurisdiction over the soil occupied by the works, but the message as a whole, as also Monroe's explanation in 1822, of the powers exercised by the Cumberland Road Bill and other early measures, renders it at least not improbable that he did so construe it. Neither does the message

<sup>1</sup> *The Cumberland Road*, by Archer Butler Hulbert (1904). Appendix, pp. 192, 193.



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explicitly affirm or deny the principle afterward advocated by Monroe, that, under its power to appropriate money Congress could aid the States in such works; but it at least hints at such a doctrine, in its statement that, "restriction of the power to provide for the common defense and general welfare to cases which are to be provided for by the expenditure of money would still leave within the legislative power of Congress all the great and most important measures of Government, money being the ordinary and necessary means of carrying them into execution."<sup>1</sup>

By the date of Madison's veto, Jefferson had departed sufficiently from the views he held at the time of signing the Cumberland Road Bill, to approve its doctrine<sup>2</sup>; and he developed his new opinions to the extreme views embodied in his "Solemn Declaration and Protest of the Commonwealth of Virginia," in 1825, on the principles of the Constitution of the United States and on the violations of them by various contemporary proposals for internal improvements,<sup>3</sup> which he sent to Madison with the characteristic statement, that if Madison approved it and it were published, Jefferson would see that the publication would be effected in such manner that it could not be traced to either of them.

Madison's views expressed in the Bonus Bill veto were, however, not accepted by all of his own party

<sup>1</sup> *Writings of Madison*, viii., 386; Richardson: *Messages and Papers of the Presidents*, i., 584.

<sup>2</sup> *Writings of Jefferson* (Ford), x., 91.

<sup>3</sup> *Ibid.*, x., 349.

at the time they were uttered. Thus Calhoun, when advocating the bill which Madison vetoed, asserted the authority of the general government to construct internal improvements under the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare." He left it an open question whether, under this power, the general government could construct works in a State without its consent, considering this merely an abstract question of no practical importance, since no State would withhold its consent.<sup>1</sup> And the "Report of the Committee of the House of Representatives on so much of the President's Message as relates to Roads, Canals and Seminaries of Learning," of December 15, 1817, affirmed the power of Congress, under the Constitution, (1) to lay out, construct, and improve post-roads through the several States, with the assent of the respective States; and (2) to open, construct, and improve military roads through the several States, with the assent of the respective States. It declined to "enter upon the delicate inquiry whether the right can be exercised by the general government without the assent of the respective States through whose territories a road is constructed in time of peace, with a view to military operations in any future wars."<sup>2</sup>

If Madison had hinted at the power of appropriating money, as sufficient to aid internal improvements, this position was explicitly taken by Monroe upon principle, and applied in practice in connection with

<sup>1</sup> *Works of John C. Calhoun* (Crallé), vol. ii., 192.

<sup>2</sup> *State Papers*, 1st Session 15th Congress, vol. vi., p. 11.

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his veto of the Cumberland Road Bill of 1822, which he accompanied by a long and elaborate statement of his "views upon the subject of internal improvements."<sup>1</sup>

This message can be understood only by observing that Monroe construed the bill to virtually assert the jurisdiction of the central government over the land occupied by the road within the several States through which it extended. He had previously approved four bills appropriating money to various extensions, repairs, etc., of the same road.<sup>2</sup> The particular bill which he vetoed provided for the establishment of turnpikes, with toll gates and tolls, and the levying of tolls he held to be equivalent to the assertion of ownership in and jurisdiction over the soil. When, therefore, he refers throughout the message to the power of constructing roads, etc., it seems clear he intends a power which includes the assertion of ownership in and jurisdiction over the soil, not the bare power to authorize the employment of men to do work on the road, or to appropriate money to have such work done. With this understanding of the meaning of "power to construct," Monroe denied that it had been granted to Congress by any clause of the Constitution. But while denying the power to construct improvements, or to exercise sovereignty over the lands they occupied, he insisted that Congress had a very wide power to appropriate

<sup>1</sup> *Writings of Monroe* (Hamilton), vol. vi., 216 to 284. See also the veto message in Richardson: *Messages, etc., of the Presidents*, vol. ii., 142.

<sup>2</sup> Hulbert, *The Cumberland Road*, Appendix, pp. 193, 194.

money for their construction, repair, etc.; and his remarks upon prior laws relating to the Cumberland Road and other internal improvements imply his belief that Congress could authorize and carry on the mere work of construction, if the consent of the States affected were first obtained, and jurisdiction over the land were not asserted. For he says that, under earlier laws, the United States had exercised no act of jurisdiction or sovereignty within any of the States by taking the land from the proprietors by force, by passing acts for the protection of the road (against malicious injuries and the like), or by raising a revenue from it by the establishment of turnpikes or tolls, nor any act founded on the principle of jurisdiction or right. All that they had done had been to appropriate the public money for the construction of the road, and to cause it to be constructed. He asserted the principle, that under the Constitution, Congress has a great power of raising and appropriating money, extending not only to appropriations in aid of other powers specifically enumerated in the Constitution, but to appropriations for all national purposes; and he explicitly stated, that Congress had the right to appropriate money for internal improvements, to be expended under the protection of the laws of the several States. But he considered that the power of the United States to acquire the ownership of and exercise jurisdiction over the land occupied by the improvements, was necessary to their proper construction and maintenance, and he therefore advocated an amendment to the Constitution to secure such power to the general government.

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As the principles of the "Views" were interpreted by Monroe, doubtless, in part, under the pressure of public demands for works of internal improvements, the power of Congress continued liberal enough to considerably advance such works. For shortly after his veto of 1822, Monroe approved a bill by which \$25,000 was appropriated for repairs to the Cumberland Road, and the President was authorized to appoint a superintendent; and one of his last acts as President, was to approve a bill, under which \$150,000 was appropriated for constructing portions of the road in the State of Ohio, and surveying extensions of it to the Mississippi.<sup>2</sup> Monroe gave further proof of the extent to which his views allowed the general government to foster internal improvements, upon one Constitutional ground or another, by reiterating, in his annual message, of December 2, 1823, his belief that Congress had power to appropriate money for such national objects as canals, and recommending that under such power, authority be given to employ engineers to make surveys for and report upon a great waterway to connect the waters of the Chesapeake and the Ohio by one continuous canal.<sup>3</sup> Pursuant to this recommendation a law was passed by Congress, and approved by President Monroe, on April 30, 1824, authorizing the President to cause the necessary surveys, plans, and estimates to be made of "the routes of such roads and canals as he may

<sup>1</sup> Hulbert, *The Cumberland Road*, Appendix, p. 194.

<sup>2</sup> *Ibid.*, 194, 195; (Laws U. S. 1821 to 1827, vol. vii., p. 417; vi., 536).

<sup>3</sup> Richardson: *Messages, etc., of the Presidents*, ii., 216.

deem of national importance, in a commercial or military point of view, or necessary for the transportation of the public mail."<sup>1</sup> That the construction of extensive improvements was understood to be authorized by this act seems to be indicated by the fact noted by the President in his annual message of December 7, 1824, that under the act surveys of the routes of five canals were in progress, the message adding that there was good cause to hope that the object would soon be accomplished.<sup>2</sup>

Monroe's second administration completes the second period in the development of principles concerning the power of Congress over internal improvements. Down to this date, we can trace a certain regularity in the progressive changes of view. We find first, under the Confederation, evidence of a general intention to vest Congress with the power to construct such works. Next, under the Constitution, it is asserted that Congress possesses the power, and it is not expressly limited to cases in which the State consents to the undertaking. But after the democratic uprising which carried Jefferson into the Presidency, the danger to the autonomy of the States, if the power were exercised within their limits without their consent, is recognized, and it is now asserted that the Constitution bestows the authority, only when the State which is affected consents to its exercise. Next, as the attitude toward "States Rights" becomes more and more the test of party, the power is further limited to the making of appropriations for the works

<sup>1</sup> Laws U. S. 1821 to 1827, vol. vii., 239.

<sup>2</sup> Richardson: *Messages, etc., of the Presidents*, ii., 255.

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without assertion of jurisdiction over the soil. But this limitation is so applied practically, that many works of internal improvement still go on, the demand for them throughout the country forcing this course upon the party leaders, without the formality of amendment of the Constitution, and in this condition the matter is left by Monroe.

After his second administration, it is not possible to reduce the discordant ideas of successive Presidents to any principle, or simple group of principles, and I shall therefore consider the successive administrations simply in chronological order, without attempting to express any generalizations concerning them.

Although, however, it is not possible to reduce the opinions of the Presidents after Monroe to a system, a general tendency toward relaxation of "strict construction" of the constitutional power of Congress over internal improvements is clearly indicated, and certain later Presidents are hard pressed to reconcile their support of the improvements which the country demands, with their constitutional principles. The consequence is, the enumeration of barren, verbal rather than substantial, principles of constitutional interpretation or construction.

The pressure of events is too great to be resisted by constitutional theories. Party exigency overrules historic principles, and for definite broadly based doctrines are substituted artificial excuses for occasional lapses from asserted principles, and thus the development of the favor shown by all political parties to the construction by Congress of works of internal improvement is a conspicuous example of

the displacement of political theories by concrete public needs.

Monroe, as well as John Quincy Adams, after him, approved bills authorizing the Secretary of the Treasury to subscribe, in the name and for the use of the United States, to the stock of various internal improvement companies.<sup>1</sup> But under Adams internal improvement schemes attained such extravagance, that reaction set in, upon economical as well as upon constitutional grounds, and President Jackson, in 1830, vetoed a bill authorizing a subscription to the stock of the Maysville, Washington, Paris and Lexington Turnpike Road Company. In his veto message, he approved the doctrine of Monroe, that Congress could not construct, but could appropriate money for internal improvements, and his veto seems to be principally based upon the consideration that the particular project was not one of national, but only of local importance.<sup>2</sup>

Jackson frequently repeated opinions similar to those of his Maysville Road veto in subsequent vetoes and annual messages, and, upon the whole, his difficulty with bills for such purposes seems to have been rather that they were of local character, than that they violated a fundamental constitutional principle.<sup>3</sup>

In his veto of the bill making appropriations for improvements of certain rivers and harbors, June 11,

<sup>1</sup> As to Monroe, *see* Laws of U.S. relating to the Improvement of Rivers and Harbors (U.S. Engineers), vol. i., 29; as to Adams, *ibid.*, p. 45.

<sup>2</sup> Richardson, *Messages, etc., of the Presidents*, ii., 483, 485.

<sup>3</sup> *Ibid.*, ii., 491, 493, 511, 639; iii., 65.



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1844, President Tyler denied that Congress had power adequate to such works under the commerce clause of the Constitution. But his most important objection seems to have been based upon the merely local importance of some or all of the improvements. For he refers to his approval of bills for improving the Mississippi and certain harbors on the Lakes, in such terms as to indicate he was not ready to commit himself to a principle, which would have taken from Congress the power to authorize all internal improvements, national and local.<sup>1</sup> His last annual message of December 3, 1844, reiterates opinions similar to those noted.<sup>2</sup>

President Polk, in his veto message of August 3, 1846, asserted principles opposed to those advanced by Monroe; for he based his objections to the river and harbor bill then before him, upon the ground that the Constitution did not confer upon the Federal Government the power to construct works of internal improvement within the several States, nor to appropriate moneys from the Treasury for such purposes.<sup>3</sup> In his veto message of December 15, 1847, he still more directly opposed the principle asserted by Monroe, as to power to appropriate money, saying:

“It is impossible to conceive on what principle the power of appropriating public money when in the Treasury can be construed to extend to objects for which the Constitution does not authorize Congress

<sup>1</sup> Richardson, iv., 330 *et seq.*

<sup>2</sup> *Ibid.*, iv., 351.

<sup>3</sup> *Ibid.*, iv., 461 *et seq.*

to levy taxes, or imposts, or raise money. The power of appropriation is but the consequence of the power to raise money; and the true inquiry is whether Congress has the right to levy taxes for the objects over which power is claimed."<sup>1</sup>

Zachary Taylor, we may be sure, differed from Polk in his opinions upon the power of Congress over internal improvements; at least his annual message recommended surveys for the Pacific Railroad.<sup>2</sup>

President Fillmore repeated this recommendation in his first annual message, entertaining no doubts as to the authority of Congress to make appropriations for internal improvements. He derived the power chiefly from the commerce clause of the Constitution,<sup>3</sup> and repeated similar views in his annual message of December 2, 1851.<sup>4</sup>

In his first annual message, President Pierce did not commit himself to any definite constitutional principle, but recommended to Congress the reconsideration of the entire question, apparently with a view to preventing all future appropriations for merely local improvements. He, however, favored the grant of lands to such railroad lines as would be of real public importance, and suggested that the principle should be to confine the grant to cases where a prudent landed proprietor would make it.<sup>5</sup>

<sup>1</sup> Richardson, iv., 620.

<sup>2</sup> *Ibid.*, v., 20.

<sup>3</sup> *Ibid.*, v., 90.

<sup>4</sup> *Ibid.*, v., 130

<sup>5</sup> *Ibid.*, v., 217, 219.

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He repeated similar views in his second annual message,<sup>1</sup> and, in his veto of August 4, 1854,<sup>2</sup> indicated that he would be willing to approve bills making appropriations for internal improvements of national importance, but not for those of merely local importance. In the exposition of his views he asserted that the Constitution gave no power to undertake works of internal improvement generally, but admitted that it gave power to undertake particular works when manifestly required to aid the performance of some other power; such as the power to establish post-roads, to regulate commerce, etc. "If," he wrote, in his message, December 30, 1854,<sup>3</sup> "the particular improvement, whether by land or sea, be necessary to the execution of the enumerated powers, then, but not otherwise, it falls within the jurisdiction of Congress. To this extent only can the power be claimed as the incident of any express grant to the Federal Government." Upon the whole, therefore, this message seems to greatly enlarge the powers of Congress beyond the limits within which the vetoes of Pierce's predecessors in office had attempted to confine them. His veto of May 19, 1856, reiterated the same principles<sup>4</sup>; but in that of May 22, 1856, he seems to have intended to restrict the power of Congress more narrowly than in his message of August 4, 1854, and to deny the constitutional power to make internal improvements, even of national

<sup>1</sup> Richardson, v., 256.

<sup>2</sup> *Ibid.*, v., 260.

<sup>3</sup> *Ibid.*, v., 261.

<sup>4</sup> *Ibid.*, v., 387.

importance,<sup>1</sup> while the messages of August 11 and 14, 1856, reiterate the principles of the veto message of August, 1854.<sup>2</sup>

In his first annual message, President Buchanan advocated a strict construction of the Constitution, but he considered it clear that, under the war-making power, Congress could appropriate money for a military road through the Territories; and under this principle he advocated a railroad to the Pacific Coast.<sup>3</sup> But the work was to be performed by other agencies, the general government only aiding by land grants, etc. In his second annual message he repeated his recommendation as to the Pacific Railroad, again deriving the Constitutional authority from the war-making power, and saying that the work of construction ought to be entrusted to companies incorporated by the States, or to other agencies, Congress aiding by grants of lands and money<sup>4</sup>; and he repeated these ideas in his third annual message.<sup>5</sup>

In his veto message of February 1, 1860,<sup>6</sup> he denied that authority to deepen the channels of rivers is granted by the power to regulate commerce, and he expressed similar views in his veto of February 6, 1860, his constitutional theory apparently being that the power from which authority to construct or

<sup>1</sup> Richardson, v., 387.

<sup>2</sup> *Ibid.*, v., 388.

<sup>3</sup> *Ibid.*, v., 457.

<sup>4</sup> *Ibid.*, v., 526.

<sup>5</sup> *Ibid.*, v., 573.

<sup>6</sup> *Ibid.*, v., 603, 607.

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appropriate money for internal improvements must be derived is the war-making power alone.

It appears, therefore, that the power of Congress was most restricted under Polk. After him, through Pierce and Buchanan, an enlargement of the power was allowed, and since the Civil War, the authority of Congress to construct or authorize the construction of works of internal improvements, when incident to the power to regulate commerce, or to other powers, has been settled by the Supreme Court upon a basis so broad, as to warrant such works without the consent, and even against the will of the States within which the works lie.<sup>1</sup>

<sup>1</sup> *Luxton vs. North River Bridge Co.* (1894), 153 U.S., 525; *California vs. Central Pacific Railway Co.* (1888), 127 U.S., 1.

## APPENDIX NO. II

### THE CONSTITUTIONAL POWER OF CONGRESS TO LEVY PROTECTIVE DUTIES ON IMPORTS

**I**F a long continued practice can legalize any exercise of the power of Congress, then the authority of that body to lay duties on imports, in order to protect domestic trades and industries, is approved by usage. The power has, however, been strenuously denied for more than eighty years, and is still controverted by learned writers. The following notes on books and documents, although without pretensions to completeness, may, therefore, be of interest to the student of the subject.

The views of Alexander Hamilton in *The Continentalist* (Lodge, vol. i., 231-273), have been already noticed. His paper in *The Federalist*, (no. xxxiii) "Concerning an Indefinite Power of Taxation," implies the power of Congress to levy duties which afford protection to domestic trades and industries.

Hamilton's Report on Manufactures, presented to the House of Representatives, on December 5, 1791 (Lodge, vol. iii., 294 *et seq.*), takes the general power of Congress to lay protective duties for granted, but contains an elaborate argument in support of the power to grant bounties. Senator Lodge's historical note, pages 416 and following, is useful.

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Of the first importance are Madison's letters to Joseph C. Cabell, in volume iii. of *Works of Madison*, Philadelphia, 1865. In the notes Madison states with great clearness a principle of constitutional interpretation which has been often resorted to by the Courts, as an aid to ascertaining the scope of the powers of Congress under the Constitution.

"It cannot be denied," writes Madison, "that a right to vindicate the commercial, manufacturing, and agricultural interests against unfriendly and reciprocal policies of other nations, belongs to every nation; that it has belonged at all times to the United States as a nation; that, previous to the present Federal Constitution, the right existed in the governments of the individual States, not in the Federal Government; that the want of such an authority in the Federal Government was deeply felt and deplored; that a supply of this want was generally and anxiously desired; and that the authority has, by the substituted Constitution of the Federal Government, been expressly or virtually taken from the individual States; so that if not transferred to the existing Federal Government, it is lost and annihilated for the United States as a nation. Is not the presumption irresistible, that it must have been the intention of those who framed and ratified the Constitution, to vest the authority in question in the substituted Government. And does not every just rule of reason allow to a presumption so violent a proportional weight in deciding on a question of such a power in the Congress, not as a source of power dis-

tinct from and additional to the constitutional source, but as a source of light and evidence of the true meaning of the Constitution."

A useful reprint of the Cabell letters, which is also interesting from a bibliographical point of view, is the pamphlet entitled "Letters on the Constitutionality and Policy of Duties for the Protection and Encouragement of Domestic Manufactures. By James Madison, late President of the United States." Richmond, Printed by Thomas White, opposite the Bell Tavern (Lenox Branch of the New York Public Library, 1829). This pamphlet contains an Appendix of useful extracts from Debates, State Papers, etc., from Washington's to Monroe's administrations, inclusive.

"A Letter to Colonel William Drayton, of South Carolina, in assertion of the Constitutional Power of Congress to impose Protecting Duties," by Mr. Gulian C. Verplanck, published for E. Bliss in New York, 1831 (Lenox), is an able and thorough presentation of the constitutional argument in favor of the power of Congress to levy protective duties.

In the division of Professor F. W. Taussig's "The Tariff History of the United States," entitled "Protection to Young Industries as applied in the United States," there is a valuable discussion of the history of legislation both in its legal and its economic aspect, from the earliest days to 1868. (New York, 1910).

Professor William Hill's "Protective Purpose of the Tariff Acts of 1789" (*Journal of Political Economy*, vol. ii., p. 54), and his "Early Stages of the Tariff Policy of the United States" (*Publications*



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of the *American Economic Association*, viii, 107), state concisely, but with great clearness and force, the facts bearing upon the question whether contemporary opinion, at the formation of the Constitution, did or did not attribute to Congress the power to impose protective duties.

*The Financial History of the United States*, by Davis Rich Dewey (New York, London, and Bombay, 1903), contains a concise argument in favor of the power.

*The Financial History of the United States, from 1789 to 1860*, by Albert S. Bolles (New York, 1885), contains a useful account of early tariff and other protective legislation.

*American Tariff Controversies in the Nineteenth Century*, by Edward Stanwood (Boston, 1903), presents the results of a thorough study of the question. The author considers that a great change of opinion with respect to the tariff took place among the leaders of the country, shortly before the meeting of the Constitutional Convention of 1787, in consequence of which the large majority of them came to favor protective duties.

A recent argument in favor of the power is contained in Conrad Reno's "Protective Tariff Laws and the Commerce Clause" (*American Law Review*, vol. xxvii., p. 519).

The works in opposition to the power are of less importance. But a vigorous argument on this side of the question is contained in "Is Congress a Sovereign Legislature?" by St. George T. Brooke (*American Law Review*, vol. xxvii., p. 33).

"The original draft of the South Carolina Exposi-

tion, prepared for the Special Committee on the Tariff, and, with considerable alterations, adopted by the legislature of South Carolina, December, 1828," is contained in volume vi. of the *Works* of John C. Calhoun, edited by Richard K. Crallé. In this same volume are also contained Calhoun's Address "On the relation which the State and General Government bear to each other," the "Address to the people of South Carolina," the "Address to the People of the United States," and other papers by Calhoun touching upon the tariff controversy and the nullification proceedings of South Carolina. In these, however, the weight of Calhoun's argument goes rather to justify the power of the States to nullify the operation of an Act of Congress, than to the question of the Constitutional power of Congress to enact a protective tariff measure.

At least of some historical and bibliographical interest is "The Report, Ordinance and Addresses of the Convention of the people of South Carolina, adopted November 24, 1832, Columbia, S. C., printed by A. S. Johnston, Printer to the Convention, 1832" (Lenox). This pamphlet contains the report of the committee to which was referred the matter of providing for calling a convention of the people of the State of South Carolina. It also contains a nullification ordinance, states the constitutional grounds in opposition to the power of Congress to impose protective duties, and presents an Address to the people of South Carolina by their Delegates in Convention, and also an Address to the people of the United States, by the convention of the people of South Carolina.

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An interesting little publication, in opposition to the power of Congress, is "A Catechism on the Tariff for the use of Plain People of Common Sense. Political Tract No. 3, September, 1831. Published by the States' Rights and Free Trade Association, Charleston, 1831." (Lenox). This pamphlet does not discuss the law or history of tariff enactments, but summarizes a few points of the controversy in the form of questions and answers.

Perhaps of some slight bibliographical interest, on the affirmative side of the question is, the "Address to the Friends of Domestic Industry assembled in Convention at New York, October 26, 1831, to the people of the United States. Published by order of the Convention, Baltimore, November 10, 1831" (Lenox), in favor of protection.

And on the same side is John Melish's little pamphlet entitled "Letter to James Monroe, Esq., President of the United States, on the State of the Country, with a Plan for improving the condition of Society." Philadelphia, June 1, 1820 (Lenox). Mr. Melish apparently believed that society could be regenerated by a protective tariff.

But a very different opinion is expressed by Mr. John Taylor, of Virginia, in *Tyranny Unmasked*, Washington City, 1822 (Lenox). It is interesting to learn from this book, that the "captains of industry" have suffered a reduction of rank in eighty years since Mr. Taylor's book was published; for in his time they were, the "generals of the industrial army."

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